99TH CONGRESS
1st Session

SENATE

REPORT
99-135

CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT OF 1985

REPORT

together with

SUPPLEMENTAL AND ADDITIONAL VIEWS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ON

S. 40, as amended

SEPTEMBER 10 (legislative day, September 9), 1985.—Ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE

50-948 O

WASHINGTON : 1985

★ **Star Print**

S 523-5

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania
MITCH McCONNELL, Kentucky

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

DENNIS W. SHEDD, *Chief Counsel and Staff Director*
DIANA WATERMAN, *General Counsel*
DEBORAH G. BERNSTEIN, *Chief Clerk*
MARK H. GITENSTEIN, *Minority Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

ORRIN G. HATCH, Utah, *Chairman*

STROM THURMOND, South Carolina
CHARLES E. GRASSLEY, Iowa

DENNIS DeCONCINI, Arizona
PAUL SIMON, Illinois

STEPHEN V. MARKMAN, *Chief Counsel and Staff Director*
RANDALL RADER, *General Counsel*
BOB FEIDLER, *Minority Chief Counsel*

CONTENTS

	Page
I. Summary	1
II. History of article V	3
III. History of constitutional convention applications	10
IV. Legislative history of S. 40	13
V. Text of S. 40 as reported	16
VI. Congressional authority	22
VII. Committee approach to S. 40	23
VIII. Limitation of subject matter to be considered	25
IX. Section-by-section analysis	20
X. Regulatory impact statement	47
XI. Cost of the legislation	47
XII. Conclusion	48
Appendix A	49
Appendix B	59
Supplemental views of Mr. Mathias	63
Additional views of Mr. Biden	69
Additional views of Mr. Leahy	70

Calendar No. 286

99TH CONGRESS
1st Session

SENATE

REPORT
99-135

CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT OF 1985

SEPTEMBER 10 (legislative day September 9), 1985.—Ordered to be printed

---

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

SUPPLEMENTAL AND ADDITIONAL VIEWS

[To accompany S. 40, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 40) to provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States under article V of the Constitution of the United States, reports favorably on such legislation, with amendments thereto, and recommends that the bill as amended do pass.

I. SUMMARY

Article V of the United States Constitution provides for alternative means of proposing constitutional amendments. The first means—the means by which each of the first twenty-six amendments to the Constitution has been proposed—requires the assent of two-thirds of each House of Congress. The second means—never before successfully completed—allows for amendments to be proposed by a constitutional convention called by the Congress upon the application of two-thirds of the States. Ratification by three-fourths of the States is then required under either amendment procedure in order for a proposed amendment to become part of the Constitution.

Because a convention under article V has never before been called, and because the terms of this provision are highly general,

a number of unanswered questions exist with respect to the constitutional convention method of amendment.[1] The purpose of S. 40, the "Constitutional Convention Implementation Act", is to address these questions and establish clear procedures by which constitutional amendments may be proposed through the convention method.

It is important to understand that S. 40 itself does not create in the States any new right with regard to constitutional conventions. Rather, it is article V of the Constitution that establishes in the States the right to petition the Congress for a convention to amend the Constitution. This right exists independent of S. 40, the present bill is designed to establish the details of this process. It is designed to constitute a congressional interpretation of the procedures inherent in article V. The authority for S. 40 is derived from the Congress' explicit authority under article V to "call" the convention upon the receipt of a sufficient number of applications from the States.

The "Constitutional Convention Implementation Act" is intended to establish neutral procedures to guide the conduct of constitutional conventions generally. While the possible imminence of a convention on the matter of a balanced budget amendment has clearly created the urgency for this legislation, the Act is intended neither to facilitate nor obstruct the eventual achievement of a balanced budget amendment or any other amendment to the Constitution. Virtually all of the present bill's provisions have antedated the present balanced budget controversy in the context of earlier legislation considered seriously by the Congress.

The principal objective of S. 40 is to ensure that the Congress has clear standards and criteria by which to judge convention applications before it, and that any convention which ultimately results is conducted in an orderly and clearly defined manner. The alternative to this bill is not an absence of a constitutional convention procedure—rather, it is a procedure that occurs amidst chaos, litigation and partisan and ideological bickering. Much of the credibility in the assertion that a convention would lead to a "constitutional crisis" derives simply from the fact that so many procedural uncertainties exist with respect to the convention process—uncertainties that S. 40 is intended to resolve.

The Committee is conscious of the responsibilities it bears in fashioning "constitutional legislation" of the character of S. 40. It has sought to develop a consensus measure, consistent with the policies inherent in article V, that will prove sound in the context of any subsequent efforts to secure a constitutional convention. It has sought to ensure that the same matrix of constitutional checks and balances is brought to bear upon the convention process as upon the other permanent institutions of our system of government.

Concern has frequently been expressed about the possibility of a "runaway" convention, unfaithful to the mandate with which it was charged by the States and the Congress. There can be no such

---

[1] See, however, the outstanding bibliography on this subject prepared by James Stasny, "A National Constitutional Convention" (1984), contained in the hearing record on S. 119 during the 98th Congress.

convention, however, unless ultimately the dissatisfactions of the people are so broad and pervasive that it is a "runaway" or "general" convention that they expressly desire. The best way in which Congress can work to ensure that this never becomes the case is to allow the people and the States to work their will under fair and established procedures when their dissatisfactions are more narrow and limited, rather than allowing them to fester as a result of contrived procedural impediments. As President Lincoln remarked in his First Inaugural Address about the convention method of amendment,

> I fully recognize the rightfully [sic] authority of the people over the whole subject [amendment to the Constitution], to be exercised in either of the modes prescribed in the instrument itself and I should, under existing circumstances favor rather than oppose a fair opportunity being afforded the people to act upon it. I will venture to add that to me the convention mode seems preferable in that it allows amendments to originate with the people themselves . . .

The perspective of S. 40 is that the States may call a convention to be limited to a particular subject matter. Indeed, its procedures are to be followed only when Congress receives applications calling for such a "limited" convention. If the requisite number of States apply for a convention on a specific subject matter, the convention may consider and propose only amendments pertaining to that subject matter.

Whatever the perspective of members of the Committee on the wisdom of resorting to the convention method of amendment, in the context of the balanced budget or any other amendment, there seems no disagreement that the nature of the right ought to be clarified in the interests of all.

II. History of Article V

The relevant text of article V is as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of Ratification may be proposed by the Congress; . . .

Without reference to authority, an initial reading of the text lends support to several obvious conclusions: First, there are two methods of proposing amendments as well as two methods of ratifying the same, thus giving the amending process as a whole the maximum amount of flexibility needed to meet changing political circumstances; second, the Framers certainly intended the States to have a role in the amending process, but not always the State governments, since the ratifying conventions may be comprised of

persons not currently in the State legislatures; and third, the Congress must carry the balance of power with regard to the amending process, partly because article V vests Congress with greater authority. Congress may not only propose amendments on its own, but it also may choose the method of ratification regardless of the method used for proposing, and call a proposing convention when presented with the proper number of appropriate applications from the States. This last obligation is the least understood, perhaps, because Congress has yet to be called upon to fulfill it. For the same reason, and because Congress could, at some point, be required to call a convention, a survey of the history of this obligation may be in order, in the hope that some explanation will be evidenced by the remnants of historical materials available.

According to 1 Farrand, "The Record of the Federal Convention of 1787" at 22 (Farrand ed. 1937) (hereinafter cited as Farrand), the earliest proposal on amendments was contained in the Virginia Plan of government introduced by Edmund Randolph on May 29, 1787. Its Resolution 13 states "that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National legislature ought not to be required thereto." This and the rest of the Randolph resolution was referred to the Committee of the Whole, into which the convention had resolved itself. The Committee debated these resolutions daily, and on June 5, 1787, the Committee voted to postpone consideration of Randolph's Resolution 13 concerning the provision for amendments. Elliot, "Debates on the Federal Convention," 2d ed. (1836) at 197 (hereinafter cited as Elliot). On June 11, consideration was again postponed on the following clause of the resolution:

> And that the assent of the national legislature ought not to be required thereto. (Id. at 204.)

Then, on June 13, Madison's Journal records consideration of a later resolution that "provision ought to be made for the amendment of the articles of union wheresoever it shall seem necessary." (5 Elliot at 190.)

During this time, the Randolph resolution was discussed and debated. Some expressed doubt as to the propriety or necessity of an amending clause while others defended it on the grounds that such a new and difficult experiment required periodical revision, that the opportunity for such revision would stabilize the government, and that "Nothing had yet happened in the states where the provision existed to prove its impropriety." (5 Elliot 157.) Thus, although the principle of amendment was agreed to, the exclusion of Congress was at issue. Col. George Mason was of the opinion that the provision was necessary, since the new plan would surely be defective as the Articles of Confederation had been found wanting:

> Amendments therefore will be necessary, and it will be better to provide for them in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the National legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an

> abuse, may be the fault of the Constitution calling for amendment. (5 Elliot 182.)

According to Mr. Yates' minutes of the debate (1 Elliot 439–514), Madison commented on the difficulties of amending a constitution:

> The difficulties of getting its defects amended are great and sometimes insurmountable. The Virginia state government was the first which was made and though its defects are evident to every person, we cannot get it amended. The Dutch have made several attempts to amend their system without success. The few alterations made in it were by tumult and faction, and for worse. (1 Elliot 503.)

The convention continued to debate the resolutions reported on June 13th by the Committee of the Whole, until July 23rd, when a Committee of Detail was appointed to draft a constitution. The amending provision referred to this committee was Randolph's original resolution except with regard to congressional participation in amending. (5 Elliot 351.)

On August 6, 1787, the Committee of Detail delivered its report, article 19 of this report provided that:

> On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose. (5 Elliot 381.)

There was no further discussion until August 30th when Article nineteen was taken up and agreed to. Gouverneur Morris suggested that Congress be permitted to call a convention whenever it chose. (5 Elliot 498.)

The issue of congressional participation in the amending process did not really arise until September 10, when Elbridge Gerry moved to reconsider Article nineteen. He criticized the article as drafted as possibly allowing two-thirds of the States to obtain a convention and then by majority vote "bind the Union to innovations that may subvert the State constitutions altogether." (5 Elliot 531.) Alexander Hamilton seconded the motion to reconsider, but with a different view from Gerry. He first pointed out that a major flaw in the Articles of Confederation was the lack of a workable method of introducing amendments:

> It was equally desirable now, that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The state legislatures will not apply for alterations, but with a view to increase their own powers. *The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments;* and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case. [Emphasis added.] (5 Elliot 531.)

Madison then remarked upon the vagueness of the phrase "call a convention for the purpose" and wondered how a convention would

be formed, by what rule it would decide, and what would be the force of its acts. The motion to reconsider was then agreed to. (Id.)

Clearly, at this juncture the drafters had become aware of the necessity for some congressional participation in the amending process. The debate then shifted focus from the question of necessity to the form this participation would take, as evidenced by the notions to change the language in order to give a larger role to the Federal Government. First the article was changed to include a congressional method of proposing amendments and requiring the consent of the States. Then, the approval of first two-thirds, and then three-fourths of the States was inserted as a change. At this point Madison moved to postpone consideration of the amended proposition in order to take up the following:

> The legislature of the United States, whenever two thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States. (Id.)

This proposal was a significant change since although an amendment could have its impetus in Congress or arise in the State legislatures, Congress would actually do the proposing. This provision also included the methods of ratification.

Five days later, the Committee on Style and Arrangement reported the amendment clause as a draft article V:

> The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . . (5 Elliot 551.)

Clearly, this provision meant such *particular* amendments as were desired by the States. Col. Mason called this plan "exceptionable and dangerous" because both modes of proposing amendments would ultimately depend upon Congress, thus making it difficult for the people to obtain amendments "if the government should become oppressive" as he believed it would. Gouverneur Morris and Elbridge Gerry then moved to amend the article so as to require a convention on application of two-thirds of the States. In response, Madison said he did not see why Congress would not be bound to propose amendments anyway, although he had no objections to providing for a convention for proposing amendments "except only that difficulties might arise as to the form, the quorum, etc., which in constitutional regulations ought to be as much as possible avoided." (Id.) The Morris motion was agreed to. Several other motions failed, including one to strike the convention

method of ratification and one to exclude the supermajority requirements of the application clause and the ratification clause.

At this point Gouverneur Morris made a motion which was "dictated by the circulating rumors of the small States . . . that no State, without its consent shall be deprived of its equal suffrage in the Senate." This motion agreed to, the article was also agreed to, thus quieting the fears of some, such as Roger Sherman of Connecticut, that the larger States could use the amending process to effectuate a shift in the balance of power that was obtained by compromise and which the Constitution as drafted was so much comprised. No discussion had ensued relating to the authority of the States to request the adoption of particular amendments.

Clearly, the foregoing evidence a shift from a definite absence of support for Federal involvement in the amending process to an acceptance of a significant measure of Federal participation throughout. The first substantive action of the convention with regard to the original Randolph resolution was to eliminate any mention of the National Legislature. In contrast, the last substantive action in the same regard was to insert a convention method of proposal as an alternative to total congressional control over the proposing aspect of the process.

The next question is whether any documents published subsequent to the Philadelphia convention but prior to the ratification of the Constitution by the States add to the understanding of the Framers' intent with respect to the final structure of article V. In *The Federalist No. 43,* January 23, 1788, James Madison addressed a number of public concerns and fears about the new Constitution and explained a number of the powers vested in the Federal Government by the document. Regarding the provision for amendments, he wrote:

> That useful alternations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every view of propriety. It guards equally against that extreme difficulty which might perpetuate its discovered faults. It moreover *equally enables the general and the state governments to originate the amendments of errors as they may be pointed out by the experience on one side or on the other* . . .

This comment appears to evidence a sensitivity on Madison's part to the complicated balance of power demonstrated by article V, which does not pose too great an obstacle to change, but simply provides the proper safeguards against extreme action. He also seems to envision the proposal of amendments on particular problems as they arise in time. This view makes sense in light of the experience under the Articles of Confederation, which lacked an appropriate method of amendment. By the time of the Philadelphia convention, the various defects of the Articles of Confederation were too numerous for changes to be implemented one at a time, so a new government was established. Given the effort made to rectify the most egregious mistakes of the earlier union, the logical assumption is that the Framers hoped for a more durable form of

government, i.e., one that could weather the political changes wrought by time. Therefore, an amending process that would provide for change as the need arose was crucial; but the process must also protect the existence of the government and not allow for its undoing.

This view was shared by Alexander Hamilton, who wrote in *The Federalist No. 85,* May 28, 1788:

> But every amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place. There can be no comparison between the facility of effecting an amendment, and that of establishing in the first instance of a complete constitution.

Hamilton was speaking specifically to the fear that Congress, once in power, could not be moved to change.[2] His comments, however, make clear his own understanding that the amendment article of the Constitution was principally designed to accommodate discrete constitutional amendments ("single propositions") rather than massive overhaul of the entire document.

Not all of the convention participants were as enthusiastic as Madison and Hamilton. In a letter to the speaker of the Virginia House of Delegates explaining his refusal to sign the Constitution as submitted for ratification, Edmund Randolph wrote:

> Again, may I be asked, why the mode pointed out in the constitution for its amendment, may not be a sufficient security against its imperfections, without now arresting it in its progress? My answers are—
>
> 1. That it is better to amend while we have the constitution in our power, while the passions of designing men are not yet enlisted, and while a bare majority of the states may amend than to wait for the uncertain assent of three-fourths of the states.
>
> 2. That a bad feature in government, becomes more and more fixed every day.
>
> 3. That frequent changes of a constitution, even if practicable, ought not to be wished, but avoided as much as possible. And

---

[2] On this matter Hamilton argued further that:

By the fifth article of the plan the Congress will be *obliged*, "on the application of the legislatures of two-thirds of the states (which at present amounts to nine) to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof." The words of this article are peremptory. The Congress *"shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, vanishes in the air . . . The *Federalist No. 85.* See also the remarks of James Madison, 1 Annals of Congress 248-51 ("then it is out of the power of Congress to decline complying . . . ").

> 4. That in the present case, it may be questionable, whether, after the particular advantages of its operation shall be discerned, three-fourths of the states can be induced . . . (Federal Constitutional Convention, hearings before the Senate Subcommittee on Separation of Powers, Committee on the Judiciary, 90th Cong., 1st Sess., Oct. 30, 1967, at 102.)

Elbridge Gerry also dissented from the Constitution as submitted; yet, with respect to the amending article, he wrote:

> The constitution proposed, has few, if any federal features; but is rather a system of national government. Nevertheless, in many respects, I think it has great merit, and, by proper amendments, may be adapted to the "exigencies of government, and preservation of liberty." (1 Elliot 532.)

Although the materials are few, there is no evidence that the Framers intended the amending process to be completely open and unchecked by Federal power. The metaphor of article V as a safety valve was hinted at in the comments by the Framers, and was described most accurately by Justice Story in 1833 in his "Commentaries on the Constitution of the United States," Vol. III (1970 ed.), at 687. Referring to the motivation of the Framers, and citing *The Federalist, No. 43,* Justice Story wrote the following:

> It was obvious, too, that the means of amendment might avert, or at least have a tendency to avert, the most serious perils, to which confederated republics are liable, and by which all have hitherto been shipwrecked. They knew, that the besetting sin of republics is a restlessness of temperament, and a spirit of discontent at slight evils. They knew the pride and jealousy of state power in confederacies; and they wished to disarm them of their potency, by providing a safe means to break the force, if not wholly to ward off the blows, which would, from time to time, under the garb of patriotism, or a love of the people, be aimed at the constitution. They believed, that the power of amendment was, if one may so say, the safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction.

In conclusion, although the history of article V is inconclusive in some respects, a few observations may be in order. First, the Framers knew by experience that a government which provides no means for change will ultimately become wholly unsuited to the circumstances of the nation, as did the Articles of Confederation. Second, providing for a means of altering and improving the fabric of government as time and experience render proper also promotes stability. Third, the goal is to make the changes practicable but not too easy; "to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory." (Story, Commentaries at 686.) Fourth, article V as finally constructed is a balance of caution and flexibility, a balance between State and Federal authority. Finally, al-

though it is impossible to foresee or guard against all exigencies, the Framers clearly desired an amendment mode that would protect the government while giving vent to frustration from without.

III. History of Constitutional Convention Applications

The history of the use of the applications clause of article V by the States can be conveniently divided into two periods, the 19th century and the 20th century. (See also generally Appendix A.)

19TH CENTURY

Although the specific issues that prompted the applications varied, all 10 applications submitted by the State legislatures to the Congress to convene a constitutional convention from 1788 to 1893 requested a general, rather than a "single issue," constitutional convention. The first three State applications, from Virginia in 1788, New York in 1789, and Rhode Island in 1790, sought to convene a "second convention" to consider major revisions to the Constitution, principally to add a bill of rights. There were no further applications until the 1830's, when the question of a State's right to interpret or "nullify" laws passed by the Congress was being debated. The State of Georgia at that time applied to Congress for a convention to propose "several amendments, restraining and restricting the power of Congress." (William R. Pullen, "the Application Clause of the Amending Provision of the Constitution" (Univ. of North Carolina 1951) (hereinafter cited as Pullen), p. 61. During this period Alabama requested a general convention in 1833 (although the legislature was primarily concerned with the issue of a protective tariff).

In 1861, four States applied to Congress to convene a general constitutional convention to address the issues raised by the impending secession movement in the South. President Buchanan, in his annual message to Congress in 1861, said that the Congress could contribute to averting the dissolution of the Union "by proposing and recommending to the Legislatures of the several States the remedy for existing evils, which the Constitution has itself provided for its own preservation"—a constitutional amendment. He said that the amendment "might originate with Congress or the State legislatures, as may be deemed most advisable to attain the object." (Cong. Globe, 36th Cong., 2nd sess., pt. 2, Appendix pp. 2–7.)

At the end of President Lincoln's inaugural address on March 4, 1861, he said of the possibility of a constitutional convention:

> I cannot be ignorant of the fact that many worthy and patriotic citizens are desirous of having the national Constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor rather than oppose a fair opportunity being afforded the people to act upon it. I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves; instead of only per-

> mitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to accept or refuse. (U.S. Senate Journal, 36th Cong., Spec. Sess., p. 404.)

The effort to call a constitutional convention failed at this time, but the State of Virginia did succeed in bringing representatives of 21 States to the capital for what became known as the Washington Conference Convention or the "Peace Convention" of 1861. (Pullen, p. 78.) This convention was not a "constitutional convention" called under article V, but it considered proposals to recommend to Congress to be considered for amendment. (Pullen, p. 97.)

THE 20TH CENTURY

The 20th century experience differs from the 19th century because, with few exceptions, the State applications have sought to call a convention that would be limited to considering a single issue rather than a general constitutional convention. In addition to the shift in emphasis to requesting a "single issue" rather than a general constitutional convention, the legislatures have often included language in their applications making them conditional. State applications are often prefaced with a request to Congress to propose an amendment on the subject of the application. The application for a convention only comes into effect if Congress fails to propose the amendment. Thus, the convention application has become for some States a "lobbying tool" that has an added impact if the number of applications approaches the necessary two-thirds to convene a convention.

In addition to the practice of including language making their applications conditional, the States have often included strict limitations on the scope of the convention. Often applications conclude that the State is requesting a convention for the "sole and exclusive purpose" of considering an amendment relating to a single subject with a further statement that if the convention exceeds the call for the convention, the State's application for a convention will automatically be withdrawn. Some States, fearing that the Congress might call a general constitutional convention based on applications for a limited convention, have included statements in their applications which proclaim that the authority to limit the subject area of a convention is a matter of States' rights which cannot be contravened by congressional action.

The subjects that have prompted these 20th century applications have varied widely. State legislatures have requested conventions to consider topics such as a general constitutional convention (applications from 21 States), busing of schoolchildren (12), world Federal Government (6), revenue sharing (14), revising article V to allow the State legislatures to propose amendments in a manner similar to the Congress (5), and the President's treaty making powers (3). Six topics that have come close to reaching the necessary two-thirds of the State legislatures for a convention include direct election of Senators, prohibiting polygamy, limiting Federal taxation, the Supreme Court's "one man, one vote" decision, prohibiting abortion, and balancing the Federal budget.

Direct election of Senators

The first constitutional convention application drive to near the necessary two-thirds of the States related to the issue of directly electing Senators. It is sometimes said that valid applications were received from two-thirds of the States in 1912 for such a convention and that Congress, in order to avoid a convention, reported a direct election amendment to the States in lieu of calling a convention.

A review of the texts of applications submitted by the State legislatures that were printed in the Congressional Record shows that one of the resolutions often cited was not an application, but merely a memorial from a State urging that the Congress propose an amendment on direct election. Thus, only 30 of the necessary 31 applications were received by the Congress. Further, a review of the debate at the time that the amendment was considered by the Congress does not show that Members cited the applications as a reason for adopting the proposed amendment. In 1951, William R. Pullen wrote that although "the applications constantly pouring into Congress from the various States must have had their effect on the Senate," the fact is that not all the applications were actually presented to Congress, and because there was no formal "system for keeping account of them" (Pullen, p. 113), the Members were probably not aware of the fact the State legislatures were one application short of the necessary two-thirds of the States.

Prohibiting polygamy

Beginning in the same period that the issue of direct election of Senators was being considered, several States became concerned about the issue of the practice of polygamous marriage. By 1930 25 States had applied for a convention to consider an amendment on that topic.

Limiting Federal taxing authority

The subject of limiting the taxing authority of the Federal Government was the next drive that approached two-thirds of the States for a convention. In a period spanning from 1939 to 1957, 27 States applied to Congress for a convention (with some variations in language) that would propose an amendment to repeal the 16th amendment and place a maximum limitation of 25 percent on the rate of Federal taxation of incomes and inheritances. (Cyril Brickfield, "Problems Relating to a Federal Constitutional Convention," 85th Congress, 1st Session (1957), p. 94.) During this period 12 State legislatures sought to withdraw their applications for a convention by passing memorials rescinding their previous applications.

"One man, one vote"

The prospect of a constitutional convention received considerable attention in the late 1960's and early 1970's, owing largely to the efforts of U.S. Senator Everett Dirksen (R.-IL). He wanted to convene a convention in order to amend the Constitution to allow one house of a State legislature to be apportioned on a basis other than population. This campaign fell two short of the necessary two-thirds of the States, with 32 of the necessary 34 States applying.

During this period three States apparently sought to withdraw their applications.

Prohibiting abortion

Although no applications have been received on this topic since 1980, 19 States have submitted applications to convene a convention that would relate to the right-to-life of the unborn.

Balanced budget

The current effort to convene a convention to propose an amendment to balance the Federal budget began in 1973. Thirty-two applications have been received by the Congress on the subject. No State legislatures have passed memorials seeking to withdraw their applications.

SUMMARY

Pullen discovered a problem, when he wrote his dissertation on the subject of the applications clause of the article V, that others have experienced later. Because there are no specific procedures set out for State applications for a convention, there are numerous impediments for tracking exactly what is happening in the area. Pullen discovered that in the 19th and early 20th centuries some State applications for conventions apparently were either not sent, or not received by the Congress. A similar situation existed in the late 1970's. Applications of several State legislatures on the subject of balancing the budget apparently had not been sent to the Congress. Only after this became known did the legislatures send them to the Congress.

The United States has had nearly two centuries of experience with the applications clause of article V, but as yet there has been no constitutional convention. During most of the 19th century the State legislatures rarely applied to Congress for a convention. If they did so, the form of the applications usually followed the language of article V. The States requested a convention for "proposing amendments to the Constitution"—a general constitutional convention.

In the 20th century the emphasis has shifted from the general to the specific. Very few applications have been received by the Congress seeking a general constitutional convention. Most applications seek a strictly limited convention. At the same time that the emphasis has shifted from the general to specific issues, the State legislatures have exercised their right to apply more often. Only 10 applications were received by the Congress from 1788 to 1893. More than 300 applications have been received since that time.

IV. Legislative History of S. 40

Congressional action for a bill prescribing the proper procedure for an article V Constitutional Convention began during the 90th Congress. Senator Sam Ervin (D-NC) introduced S. 2307, the "Federal Constitutional Convention Procedures Act," on August 17, 1967. The stated purpose of the bill was to:

> provide the procedural machinery necessary to effectuate that part of article V of the Constitution . . . which authorizes a convention called by the States to propose specific amendments to the Constitution. (S. Rep. No. 336, 92d Cong., 1st Sess. 1 (1971).)

The Senate Judiciary Committee, Subcommittee on Separation of Powers, chaired by Senator Ervin, held and published the record of hearings on S. 2307 on October 30 and 31, 1967. (Federal Constitutional Convention, hearings before the Subcommittee on Separation of Powers on S. 2307, Committee on the Judiciary, U.S. Senate, 90th Congress, 2d Session (1967).) As a result of these hearings, Senator Ervin made several changes in the text of S. 2307. (Ervin, "A Convention Method of Amending the Constitution," 66 Mich. L. Rev. (March, 1968).) The witnesses included: Alexander M. Bickel, professor, Yale Law School; Walter Mendelson, professor, University of Texas at Austin; Hon. William Proxmire, United States Senator from Wisconsin; and Theodore C. Sorenson, attorney from New York City. Although these hearings were held nearly 17 years ago, they help provide an understanding of S. 40 because the issues discussed at these hearings are still germane.

No further action was taken in the 90th Congress on S. 2307. Thereafter the bill was revised and reintroduced, by Senator Ervin, as S. 623 in the 91st Congress. After S. 623 was reported by the Subcommittee on Separation of Powers on June 19, 1969, to the full Committee on the Judiciary, no further action was taken.

In the 92d Congress, Senator Ervin introduced the same bill as S. 215 on January 26, 1971. S. 215 was reported favorably by both the Subcommittee on the Separation of Powers and the full Committee. The Senate took up formal consideration of S. 215 on October 19, 1971. Speaking in favor of the bill, Senator Ervin told the Senate S. 215 was necessary because:

> it is generally recognized that virtually no precedent exists to guide the States and Congress in answering the complex and sensitive questions involved in implementing this part [calling a constitutional convention] of the Constitution. (117 Cong. Rec. 28, 36754 (1971).)

Debate on the Senate floor focused upon section 10(a) of the bill which provided for the convention to propose amendments by a majority vote. Senator Birch Bayh (D–IN) proposed an amendment which required all conventions to have a two-thirds majority vote for final passage of a proposed constitutional amendment. The Senate voted 45–39 in support of Senator Bayh's amendment. No further amendments were offered, and the bill passed 84–0. The House took no subsequent action on the bill.

This bill was reintroduced in the 93rd Congress by Senator Ervin as S. 1272 on March 19, 1973. This bill passed the Senate by a voice vote on July 9, 1973, but once again the House took no action.

During the 94th and 95th Congresses, several constitutional convention procedure bills were introduced. No hearings or committee action was taken on any of these bills. In the 96th Congress, three separate Constitutional Convention procedures bills were referred to the Senate Committee on the Judiciary, Subcommittee on the

Constitution: S. 3 and S. 520 introduced by Senator Jesse Helms (R-NC) and S. 1710, introduced, by Senator Orrin G. Hatch (R-UT). On November 29, 1979, the Subcommittee on the Constitution, then chaired by Senator Bayh, held hearings on these bills. (Constitutional Convention Procedures, hearing before the Subcommittee on the Constitution on S. 3, S. 520, and S. 1710, Committee on the Judiciary U.S. Senate, 96th Congress, 1st Session (1979).) The following were witnesses: J.S. Kimmitt, Secretary of the Senate; John D. Feerick, American Bar Association; Charles L. Black, Jr., Yale Law School; Walter E. Dellinger, Duke Law School; William Van Alstyne, Duke Law School; and Gerald Gunther, Stanford Law School. Following these hearings, no further action was taken.

Senator Hatch reintroduced his bill with modifications as S. 817 during the following Congress. On November 3, 1981, the Subcommittee on the Constitution approved S. 817 unanimously and sent the bill to the full Judiciary Committee without amendments. No further action was taken during that Congress.

The bill was again reintroduced by Senator Hatch and Senator Dennis DeConcini (D-AZ) with modifications during the 98th Congress on January 25, 1983, as S. 119. On March 8, 1984, the Subcommittee on the Constitution approved S. 119 for full Committee consideration without amendments, and on April 25, 1984, the Subcommittee held hearings on S. 119. The witnesses were: John C. Armor, attorney and professor, University of Baltimore; and Neil H. Cogan, professor of law at Southern Methodist University.

On May 17, 1984, the full Judiciary Committee, with a quorum present, considered S. 119 and reported it out favorably by a 17-0 vote following the adoption by a voice vote of a bipartisan compromise effecting changes in a variety of areas, and a separate compromise relating to the effective period for convention applications. Following Committee action, no further action was taken on S. 119 during the 98th Congress.

S. 40 was introduced in the 99th Congress by Senator Hatch and Senator DeConcini in substantially similar form to the version of S. 119 approved by the Committee during the previous Congress. The one noteworthy change was the extension of the grandfather clause in section 5(a) to protect pending applications submitted within the past 12 years rather than the past 10 years. S. 40 was referred to the Subcommittee on the Constitution on April 11, 1985, and reported to the full Committee without amendment on May 15, 1985. On July 23, 1985, the Committee approved S. 40 by a 17-0 vote following the adoption of amendments by Senator Mathias relating to representation of the District of Columbia at the convention and Senator Simon relating to the effective date of amendments proposed by the convention. Members voting in favor of S. 40 as amended included: Mr. Thurmond, Mr. Mathias,* Mr. Laxalt,* Mr. Hatch, Mr. Simpson, Mr. East, Mr. Grassley, Mr. Denton, Mr. Specter, Mr. McConnell,* Mr. Biden,* Mr. Kennedy, Mr. Metzenbaum, Mr. DeConcini,* Mr. Leahy, Mr. Heflin,* and Mr. Simon.

---

*By proxy.

V. Text of S. 40 as Reported

A BILL To provide procedures for calling Federal constitutional conventions under article V for the purpose of proposing amendments to the United States Constitution

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Constitutional Convention Implementation Act of 1985".

APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. (a) The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, for the purpose of proposing one or more specific amendments, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more specific amendments to the Constitution of the United States and stating the subject matter of the amendment or amendments to be proposed.

(b) The procedures provided by this Act are required to be used whenever application is made to the Congress, under article V of the Constitution of the United States, for the calling of any convention for the purposes of proposing one or more specific amendments to the Constitution of the United States, each applying State stating in the terms of its application the subject matter of the amendment or amendments to be proposed. This Act is not intended to apply to applications requesting a convention for any other purpose under article V of the Constitution.

APPLICATION PROCEDURE

SEC. 3. (a) The rules of procedure governing the adoption or withdrawal of a resolution pursuant to section 2 and section 5 of this Act are determinable by the State legislature except that the assent of the Governor as to any application or withdrawal shall be unnecessary.

(b) Questions concerning compliance with the rules governing the adoption or withdrawal of a State resolution cognizable under this Act are determinable by the State legislature, except that questions concerning the fact of final approval of such resolution by no less than a majority vote of each House of such legislatures shall be determinable by the Congress of the United States.

TRANSMITTAL OF APPLICATIONS

SEC. 4. (a) Within thirty days after the effective date of the resolution adopted by the legislature of a State calling for a constitutional convention, the secretary of state of the State, or, if there be no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution, the exact text of the resolution signed by the presiding officer of each house of the State legislature, the date on which the legislature adopted the resolution, and a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution; and

(2) to the extent practicable, and if desired, a list of all State applications in effect on the date of adoption whose subject matter are substantially the same as the subject matter set forth in the application.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is presiding officer, identifying the State making application, the subject matter of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall jointly cause copies of such application to be sent to the presiding officer of each house of the legislature of every other State and to each Member of the Senate and House of Representatives of the Congress of the United States.

EFFECTIVE PERIOD OF APPLICATION

SEC. 5. (a) An application submitted to the Congress by a State, unless sooner withdrawn by the State legislature, shall remain effective for the lesser of the period specified in such application by the State legislature or for a period of seven calendar years after the date it is received by the Congress, except that whenever within a period of seven calendar years two-thirds or more of the several States have each submitted an application calling for a constitutional convention on the same subject matter all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 6 of this Act, calling for a constitutional convention. *Provided however,* That those applications which have not been before the Congress for more than twelve years on the effective date of this Act shall be effective for a period of not less than two years.

(b) A State may withdraw its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of withdrawal in conformity with the procedures specified in sections 3 and 4 of this Act, except that no such withdrawal shall be effective as to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subject matter.

CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6. (a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject matter. Whenever ap-

plications made by two-thirds or more of the States with respect to the same subject matter have been received, the Secretary and the Clerk shall so report within five days, in writing to the officer to whom those applications were transmitted, and such officer, no later than the fifth day subsequent to the receipt of such report during which the House of which he is an officer is in session, shall announce its substance on the floor of such House. It shall then be the duty of such House to determine whether there are in effect valid applications made by two-thirds of the States with respect to the same subject matter. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject matter, it shall be the duty of that House, within forty-five calendar days following the day on which the report of the Clerk or the Secretary was announced on the floor of that House, to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject matter. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention, and (2) set forth the subject matter of the amendment or amendments for the consideration of which the convention is called. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the Governor and to the presiding officer of each house of the legislature of each State.

(b) The convention shall be convened not later than eight months after adoption of the resolution.

DELEGATES

SEC. 7. (a) In each State two delegates shall be elected on an at-large basis and one delegate shall be elected from each congressional district in the manner provided by State law. No Senator or Representative, or person holding an office of trust or profit under the United States, shall be elected as delegate. Any vacancy occuring in a State delegation shall be filled by appointment of the legislature of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function, shall certify to the President of the Senate and the Speaker of the House of Representatives the name of each delegate elected or appointed by the legislature of the State pursuant to this section.

(c) The people of the District of Columbia shall elect as many delegates as the whole number of Senators and Representatives to which said District would be entitled in the Congress if it were a State. Any vacancy occurring in the delegation of the District of Columbia shall be filled by appointment of the District of Columbia Council. The Clerk of the District of Columbia Council shall certify to the President of the Senate and the Speaker of the House of Representatives the name of each delegate elected or appointed by the Council pursuant to this section.

(d) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a

session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

CONVENING THE CONVENTION

SEC. 8. (a) The President Pro Tempore of the United States Senate and the Speaker of the United States House of Representatives shall jointly convene the constitutional convention. They shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe to an oath by which he shall be committed during the conduct of the convention to comply with the Constitution of the United States. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt by vote of three-fifths of the number of delegates who have subscribed to the oath of office.

(b) There is hereby authorized to be appropriated such sums as may be necessary for the payment of the expenses of the convention, including payment to each delegate of an amount of pay equal to that for Members of Congress prorated for the term of the convention, as well as necessary travel expenses for such delegates. In the event that such sums are not appropriated in a timely manner, or are appropriated subject to additional conditions, the convention shall be authorized to apportion its costs among the States.

(c) The Administrator of General Services shall provide such facilities, and the Congress and each executive department, agency, or authority of the United States shall provide such information and assistance as the convention may require, upon written request made by the elected presiding officer of the convention.

PROCEDURES OF THE CONVENTION

SEC. 9. (a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The vote of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within six months after convening unless the period is extended by concurrent resolution of the Congress of the United States upon request from the convention.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

PROPOSAL OF AMENDMENTS

SEC. 10. No convention called under this Act may propose any amendment or amendments of a subject matter different from that stated in the concurrent resolution calling the convention.

APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11. (a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit to the Congress the exact text of any amendment or amendments agreed upon by the convention.

(b) Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the Congress shall in as expeditious a manner as possible, but in any case within six months thereafter, adopt a concurrent resolution—

(i) directing the Administrator of General Services to transmit forthwith to each of the several States a duly certified copy thereof, and a copy of any concurrent resolution agreed to by both Houses of Congress which prescribes the mode in which such amendment shall be ratified and the time within which such amendment shall be ratified in the event that the amendment itself contains no such provision. In no case shall such a resolution prescribe a period for ratification of less than four years; or

(ii) stating that the Congress does not direct the submission of such proposed amendment to the States because such proposed amendment relates to or includes subject matter which differs from or was not included in the subject matter named or described in the concurrent resolution of the Congress by which the convention was called.

(c) In the event that the Congress has not passed a concurrent resolution under subsection (b)(i) within the time prescribed therein, during the thirty days following any State may commence an action under section 15 of this Act seeking a declaration that the proposed amendment is consistent with the concurrent resolution by the Congress by which the convention was called and directing its submission to the States for ratification.

(d) Notwithstanding the issuance of such order, the mandate of the Court shall not issue prior to the expiration of the first period of thirty days following the date on which such order is issued. Congress may during such thirty-day period, adopt a concurrent resolution prescribing the mode in which such amendment shall be ratified, and the time within which the amendment shall be ratified in the event that the amendment itself contains no such provision. In no case shall such a resolution prescribe a period for ratification of less than four years.

(e) In the event that the Congress has not adopted a concurrent resolution under subsection (d) within the time prescribed therein, the mandate for such order shall issue forthwith. The mode for ratification in such case shall be by action of the legislatures of three-fourths of the States within a period of seven years, unless the amendment itself contains a different period.

RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12. (a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitu-

tion of the United States when duly ratified by three-fourths of the States in the manner and within the time specified consistent with the provisions of article V of the Constitution of the United States.

(b) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

RESCISSION OF RATIFICATIONS

SEC. 13. (a) Any State may rescind its ratification of a proposed amendment by the same procedures by which it ratified the proposed amendment, unless other procedures are specified by such State, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal or may have rescinded a prior ratification thereof.

PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

JUDICIAL REVIEW

SEC. 15. (a) Any State aggrieved by any determination or finding, or by any failure of Congress to make a determination or finding within the periods provided, under section 6 or section 11 of this Act may bring an action in the Supreme Court of the United States against the Secretary of the Senate and the Clerk of the House of Representatives or, where appropriate, the Administrator of General Services, and such other parties as may be necessary to afford the relief sought. Such an action shall be given priority on the Court's docket.

(b) Every claim arising under this Act shall be barred unless suit is filed thereon within sixty days after such claim first arises.

(c) The right to review by the Supreme Court provided under subsection (a) does not limit or restrict the right to judicial review of any other determination or decision made under this Act or such review as is otherwise provided by the Constitution or any other law of the United States.

EFFECTIVE DATE OF AMENDMENTS

SEC. 16. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then one year after the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.

SEVERABILITY

SEC. 17. In the event that any part of this Act be held unconstitutional, the same shall not necessarily affect the validity of other sections of the Act.

VI. CONGRESSIONAL AUTHORITY

Although there is no explicit statement to this effect in article V, there can be little doubt that the Congress is possessed with the authority to issue legislation on the subject matter of the "Constitutional Convention Implementation Act". Article V states in relevant part that:

> The Congress . . . on the Application of the Legislatures of two-thirds of the several States shall call a Convention for proposing Amendments.

Congress' explicit authority under this provision is to "call" the convention. The powers invested in Congress under S. 40 are entirely a function of this responsibility, authorized under the "necessary and proper" clause of article I, section 8, clause 18. (See *McCulloch* v. *Maryland,* 4 Wheat (17 U.S.) 316, 420 (1819).)

As a necessary incident of its responsibility to "call" the convention, Congress must have the authority to determine that the constitutional preconditions exist for such a convention. Most importantly, this requires that Congress be empowered to ascertain whether there are sufficient States with valid applications for such a convention. The principle part of S. 40 is directed toward establishing procedures and standards by which this judgment can be made.

The Congress, as well, clearly possesses the authority to set forth the necessary and attendant details of the convention, such as the determination of time and place. This is a direct function of its authority to "call" a convention and follows not only from the express text of the Constitution but also from the absence of any other body in a position to undertake these decisions. Similarly, such other preliminary issues addressed in S. 40 as the apportionment of convention delegates and questions of financing cannot fairly and effectively be made by any other extant body than the Congress.

Once, however, the convention has been called into being, it is the further premise of S. 40 that the convention itself ought to be charged with establishing internal operating procedures and policies. This follows from the limited character of the authority established in the Congress by article V as well as from the inherent authority of a deliberative, legislative body to adopt its own rules of conduct.

As the Special Constitutional Convention Subcommittee of the American Bar Association has observed, for example, on the question of the vote to be required by the convention in proposing amendments:

> First, it appears from our research that throughout our history conventions generally have decided for themselves the vote that should govern their proceedings. This in-

> cludes the Constitutional Convention of 1787, the constitutional conventions that took place between 1776 and 1787, many of the approximately two hundred state constitutional conventions that have been held since 1789, and the various territorial conventions that have taken place under acts passed by Congress. Second, the specific intent of the Framers with regard to the convention method of initiating amendments was to make available an alternative method of amending the Constitution—one that would be free from congressional domination. Third, a reading of the 1787 debates suggests that the Framers contemplated that an Article V convention would have the power to determine its own voting and other internal procedures and that the requirement of ratification by three-fourths of the states was intended to protect minority interests. [Citations omitted.] (American Bar Association, Special Constitutional Convention Study Committee, "Amendment of the Constitution by the Convention Method Under Article V", p. 20.)

As reflected in its action in reporting S. 40 unanimously to the Senate floor, the Committee views the Congress as not merely having the authority to enact legislation of this character but also as having a duty to do so in order to ensure that the provisions of article V, are fully and effectively implemented.

The Committee also notes the suggestion that legislation such as S. 40 is inappropriate since "no Congress can bind its successors". *Cf.,* however, 3 U.S.C. 15 (relating to electoral college procedures). While it is unquestionably true that no such legislation can bind any Member of Congress (whether of a present or future Congress) to vote for a measure he or she believes to be unconstitutional, it nevertheless serves extremely important purposes: (a) such legislation can effectively establish an operative legal rule until affirmatively amended by a future Congress; (b) such legislation can effectively apprise the States of their rights and obligations and inform them of the likely constitutional consequences of their actions; (c) such legislation establishes at least a presumptive constitutional interpretation by the Congress that is not likely to be overturned in the absence of a strongly held view by a subsequent Congress that it incorrectly interpreted the Constitution; and (d) such legislation increases the likelihood that convention applications will be scrutinized on the basis of neutral constitutional procedures rather than through a series of result-oriented policy judgments.

VII. Committee Approach to S. 40

Largely because the constitutional convention method of amendment has never been successfully employed in the past, there are legitimate and significant questions that relate to it. In the absence of any clear precedent, the Committee in the development of the present legislation has attempted to structure its provisions based upon an analysis of the relevant text in article V, its legislative history, and an understanding of its purposes and objectives. Each of the many questions involved in the constitutional convention process, however, remains a threshhold question and may frequent-

ly be open to debate among knowledgeable persons familiar with the origins of the Constitution.[3]

A brief summary may be in order as to some of the operative premises that came to underlie the present legislation. First, to the best of their abilities, members of the Committee attempted to consider the issue of the constitutional convention apart from any particular substantive controversy. While it is no secret that the need for this legislation is rendered more urgent by the pending constitutional convention effort in behalf of a balanced budget amendment, this legislation is designed neither to facilitate nor to obstruct the eventual achievement of a convention or of an amendment on this or any other subject. The immediate Act is intended to establish neutral procedures to guide the conduct of constitutional conventions generally.

Second, the Committee recognized that article V explicitly created the convention method of amendment and established an absolute right in the States to initiate this method of amendment. Thus, although there are members of the Committee strongly opposed to a constitutional convention—not merely in the context of pending amendments but in the context of any amendment—the present bill has been structured on the premise that the availability of such a convention was not at issue. Rather, the Committee has sought to ensure that, if the States are sufficiently determined to apply for a convention, that this process will take place in as orderly and well-defined manner as possible.

Third, the Committee has operated on the premise that the Constitution authorizes the Congress to promulgate legislation of this nature subject to certain limits placed upon that authority. See *supra* section VI.

Fourth, the Committee has attempted to structure a convention procedure that would be subject to a similar set of checks and balances as any other action of the national government, with the exception that the President could not be involved in the amendment process. Thus, the convention, while acting as a sovereign and independent (albeit temporary) institution of the national government, would nevertheless be subject to limits upon the ambit of its authority. Similarly, the Congress would be subject to checks upon the range of its own authority to influence the convention process.

Fifth, the Committee considered it important to ensure that exercises of the Congress' discretion in the process were subject to judicial review. It cannot be gainsaid that an overriding objective of the convention process was to ensure a method of initiating constitutional amendments by the States in the event of a recalcitrant Congress. Such recalcitrance was predicted, by the Founding Fathers, principally in the context of proposed amendments to limit the powers or authorities of the Congress itself.[4] As with any other

---

[3] Among the constitutional scholars who have contributed significantly to the deliberations of the Committee in recent years, from a variety of perspectives, have been Professor William Van Alstyne, Duke University Law School; Professor Gerald Gunther, Stanford Law School; Professor Neil Cogan, Southern Methodist Law School; Professor Walter Dellinger, Duke University Law School; John Armor, University of Baltimore Law School; Professor Charles Black, Yale Law School; and John Feerick, formerly of the American Bar Association, and now Dean of the Fordham Law School.

[4] As Alexander Hamilton observed on this matter:

Continued

institution, they supposed that the Congress would not look with favor upon proposals designed to restrict their own actions. Thus, the Committee has considered it important to establish a procedure which, while empowering the Congress to carry out its functions under article V, equally ensures that they will not be carried out in a way that is obstructive of the convention process.

Sixth, the Committee attempted to understand the convention process in the larger perspective of article V. In so doing, it sought to draw a balance between a convention method of amendment which would render the Constitution "too mutable", *The Federalist No. 45,* and one which would render it null and void by posing too cumbersome a method. The amendment process should never be one that can successfully be employed with great ease, yet neither should it be a process totally incapable of being used to alter the Constitution.

Finally, the Committee in fleshing out the interstices of article V attempted to be faithful to the text, history, and spirit of this provision of the Constitution. The "Constitutional Convention Implementation Act" represents a good-faith, bipartisan effort by the Congress to interpret and give effect to what may be the most important article of the Constitution—that by which we enable the Constitution to respond to the changing tides of history and circumstances.

S. 40, as with any other product of a committee, reflects a collective effort. A number of important compromises were struck. Given the large number of policy decisions required to formulate a comprehensive procedures bill, it is possible that no particular member of the Committee would adopt the present bill as reflecting his considered judgement in every respect. On balance, however, the Committee believes that this Act represents an honest and responsible judgement on the meaning of article V with respect to the "calling" of a constitutional amending convention.

VIII. Limitation of Subject Matter To Be Considered by Convention

A recurrent issue raised in the context of the convention process in article V relates to the ability of Congress and the States to limit the scope of amendments to be considered by the convention. This issue is often manifested by a concern that a convention not so limited may eventually come to operate as a "runaway" convention debating and proposing amendments unrelated to the subjects originally responsible for it having been called into being.

S. 40—as with its predecessors in 1971 and 1973 which were unanimously approved by the Senate—adopts the view that a constitutional convention can be limited in its authority and that these limits can be enforced by the Congress. As a document of the House of Representatives noted in 1957:

"The most powerful obstacle to the Members of the Congress betraying the interests of their constituents is the State legislatures themselves who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essays at treachery."

> The convention method of amending the constitution would be reduced to an unworkable absurdity from both the standpoint of the states having a voice in the convention process and from the magnitude of the operation and its ultimate effect on our government, if only general conventions were permissible under Article V. ("Problems Relating to a Federal Constitutional Convention", Committee on the Judiciary, U.S. House of Representatives, 88th Congress, 1st Session (1957), p. 20.)

Under this legislation, it is the States themselves, operating through the Congress, which are ultimately responsible for imposing subject-matter limitations upon the article V convention. Under section 2(a), the States are authorized to apply for a convention "for the purpose of proposing one or more specific amendments". Indeed, that is the only kind of convention within the scope of the present legislation, although there is no intention to preclude a call for a "general" or "unlimited" convention if such is the desire of the States. When two-thirds of the States are in agreement on the need for a "limited" convention on the same subject-matter, the Congress is obliged to convene such a convention and to define its authority through a concurrent resolution. (Section 6(a).) The convention would subsequently be prohibited from proposing any amendment or amendments of a subject matter different from that stated in the congressional resolution. (Section 10.) The Congress could refuse to submit any amendment to the States which was outside the charter of the convention. (Section 11(b)(ii).) The Supreme Court could review actions by the convention which were outside the charter of the Convention. (Section 15.)

The Committee believes that the notion of a "limited" convention is entirely within the contemplation of article V of the Constitution. It rejects the notion that this provision contemplates only a general purpose or unlimited authority convention. The Committee does so for the following reasons:

TEXT OF ARTICLE V

The relevant part of article V states that the Congress "on the Application of the Legislatures of two-thirds of the several States shall call a Convention for proposing Amendments . . .". In the context in which the term "Amendments" appears here, the Committee understands it to be referring to "such Amendments as the States wish to have the Convention consider". The purpose of article V is to create—and thus necessarily to define in the first instance—a "convention". It does so by establishing such a "convention" as one for the purpose of "proposing Amendments". In a different context—in which, for example, additional authorities were being vested in an already established "convention" branch of government—the phrase "proposing Amendments" might reasonably be taken to mean "such Amendments as the Convention itself shall see fit to propose", and thus to contemplate a convention of a broader character. Where, however, the phrase is used in the context of the very sentence of the Constitution creating in the States the authority to initiate constitutional amendments through a convention, the far more reasonable understanding of "proposing

Amendments" is that it alludes to the authority of the States as effectuated through the convention mechanism. The provision in question grants power to the States, not primarily to a convention.[5] To define the convention clause otherwise—and to adopt a falsely literalist reading—would necessitate interpreting this provision in a manner such that: (a) the convention (and Congress by implication) could only exercise the "proposing" authority on behalf of multiple amendments; and (b) the convention could not be utilized for the purpose of drafting an entirely new Constitution but merely discrete amendments. Neither of these policies is generally understood to be contained in article V.

LEGISLATIVE INTENT OF ARTICLE V

The final language of article V resulted from a compromise between those Members of the drafting convention who preferred to limit the amending power to the initiation of the States and those who wished to limit it to the new national government. Speaking for those who objected to limiting the amending power to the Congress, George Mason of Virginia argued that such a procedure would result in a situation "where no amendment of the proper kind would ever be obtained by the people, if the [national] government should become oppressive * * *". (5 Elliot 551.) The ultimate text of article V reflects an important compromise struck at the convention whereby either the Congress or the States would be capable of initiating proposed changes in the Constitution. As James Madison was later to observe in *The Federalist, No. 43:*

> Article V *equally* enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other. [Emphasis supplied.]

In other words, the original purpose of the convention method of amendment was to enable the States to embark upon amendments to the Constitution in those areas in which the Congress for whatever reasons was disinclined or reluctant to act. As Harvard Law School Professor, Paul Bator, has remarked:

> The central purpose of the convention provision of article V was to give the states recourse in the event that intransigent central authority refuses to consider a grave constitutional infirmity or defect. (Forum, A Constitutional Convention: How Well Would It Work? (American Enterprise Institute, 1979), p. 11.)

In particular, its purpose was to enable the States to embark upon those amendments which might tend to limit or restrict the power of the national government itself since the Congress, as with most other governmental institutions, would probably never be en-

[5] "One might say that the power to call a convention to consider an amendment you desire and the power to call a convention to consider any and all amendments are as different as (1) the freedom to marry a person of your own choosing; and (2) the freedom to marry, provided that you commit yourself in advance to marry one or more persons selected by somebody else." Professor Grover Rees, University of Texas Law School, testimony submitted to Subcommittee on the Constitution (1980).

thusiastic about limiting or restricting its own authority. As Alexander Hamilton later observed about the new Constitution:

> We must safely rely on the disposition of the State legislatures to erect barriers against the encroachment of the national authority. *(The Federalist, No. 25.)*

The clear purpose of article V would be undermined if a convention could not, under any circumstances, be limited, whatever the desires of the States applying for it. It would be undermined, first, because article V would no longer, in Madison's words, "equally enable" amendments by the States and by Congress since the Congress would be free to initiate single-subject amendments as they have done for two centuries while the States would be required to place the entire Constitution "up for grabs" each time they wished to initiate constitutional amendments.

Second, article V would be undermined as the convention method of amendment would effectively be rendered a constitutional "dead-letter". What State, possessing some limited and narrow grievance, would wish to open up the entire Constitution as a necessary evil in attempting to remedy that grievance? What better means could there be for confining the constitutional amendment process to the congressional-proposed amendment? As the distinguished constitutional scholar, William Van Alstyne of Duke University Law School, has observed about the argument that a convention cannot be limited:

> I find it perfectly remarkable that some have argued for a construction of article V which not only limits the power of state legislatures to have a convention—but would limit that power to its least expected, least appropriate, most difficult (and yet most dangerous) use. ("The Limited Constitutional Convention", 1979, Duke L.J. 985, 991.)

Rather, the evidence is to the contrary—that the Founders intended the State and congressional-initiated methods of amendment to be equal and symmetrical.[6]

NEED FOR CONSENSUS [6]

The underlying principle of article V is the need for constitutional consensus as a precondition to amending the Constitution. See *Dillon* v. *Gloss,* 256 U.S. 368, 375 (1921). The procedures set forth by Article V are designed to determine whether there is sufficient consensus among the States at a given period in time to warrant the alteration of our organic law. The idea that only a general-authority convention is permitted under article V is utterly inconsistent with this precept.

Article V speaks of Congress calling a convention upon the applications of the legislatures of two-thirds of the States. The facts are

---

[6] In response to the observation that the original Philadelphia Convention was itself "unlimited", it should be observed, of course, that the convention occurred under the auspices of the Articles of Confederation, not article V of the Constitution. Apart from this, however, it should be noted that the convention "sent its proposal to the Congress not merely for transmittal to the States but for approval by the Congress and then transmittal to the States. Such a 'request' for approval by the Congress would seem to imply that Congress was free to disapprove . . ." (Professor Wallace Mendelson, 1967 hearings, p. 45.)

that the Congress at present has pending before it constitutional convention applications of well over that number of States. Indeed, there are at present 39 convention applications from the States.[7] Why isn't the Congress already required to "call" an article V convention? For the simple reason that there are not two-thirds calling for the same kind of convention. Some States have called for a convention on the subject of a balanced budget, others for a convention on the abortion issue, still others for conventions on an entirely different subject matter. In other words, there is no present requirement that Congress call a convention because it is well-understood that the Constitution requires *consensus.* Before a convention can be called, more is required than the two-thirds of the States apply for a convention; rather, there must be two-thirds of the States calling for a convention on the *same* subject matter.

It is inconsistent to suggest that, even though it matters that the States be of a common mind in applying for a convention, that the convention itself can consider whatever issues strike its fancy. If a convention called for purposes of considering the issue of school busing can debate abortion and school prayer and windfall oil profits, why should not those States which have requested a convention on each of these issues be lumped together for purposes of calling the convention? Either the Constitution is concerned with the idea of consensus—in which case States concerned about school busing can call for a convention concerned about school busing—or else it is not concerned with consensus—in which case the Congress at present is delinquent in not already having called a convention in response to the applications of well over two-thirds of the States. Those who oppose the idea of "limited" conventions cannot have it both ways.[8]

RUNAWAY CONVENTION

Finally, even if one finds discussion about the legislative history and objectives of article V unpersuasive, and even if one believes the various safeguards against a "runaway" convention in S. 40 to be beyond Congress' authority, the ultimate check upon such a convention is the fact that its product must be ratified by three-quarters of the States in order to become part of the Constitution.

Thus, even if constitutional convention is totally without limits in its proposal authority, it would be no different than the Congress at present in that regard. There are no limits upon the ability of the Congress to propose whatever amendments it desires, including such uncontemplatable amendments as those repealing portions of the Bill of Rights, for example. The reason that the Congress does not propose amendments that would undermine our system of government is basically simple: The Congress and the

---

[7] Since 1977 alone, there have been convention applications submitted by 36 States. In addition to those calling for a convention on the subject of a balanced budget amendment, there have been various applications on such issues as abortion, a Presidential line-item veto, judicial terms, school busing, judicial appointments, limitations of judicial authority, Federal rules and regulations, and the attachment of conditions to Federal grants-in-aid. See *infra* Appendix A.

[8] Professor Charles Black, Jr., of the Yale Law School, a distinguished albeit minority voice on the subject, is consistent, however, in his own suggestion that no convention *application* which seeks to limit a convention in any way is *valid* under article V. ("The Proposed Amendment of article V: A Threatened Disaster", 72 Yale Law Journal 198–207 (1963).)

States, representing the people, do not desire such amendments. It is absolutely inconceivable that any such amendment could secure the ratification of three-fourths of the States. The ultimate check then upon the amendment process—the need to secure the ratification of thirty-eight States of the Union—is equally applicable to amendments proposed by a convention and those proposed by Congress. As a result, the notion of a "runaway" convention, succeeding in amending the Constitution in a manner opposed by the American people, is not merely remote, it is impossible.

As the American Bar Association concludes in its study on the propriety of a "limited" convention:

> In summary, we believe that a substantively-limited Article V convention is consistent with the purpose of the alternative method since the states and people would have a complete vehicle other than the Congress for remedying specific abuses of power by the national government; consistent with the actual history of the amending article throughout which only amendments on single subjects have been proposed by Congress; consistent with state practice under which limited conventions have been held under constitutional provisions not expressly sanctioning a substantively-limited convention, and consistent with democratic principles because convention delegates would be chosen by the people in an election in which the subject matter to be dealt with would be known and the issues identified, thereby enabling the electorate to exercise an informed judgment in the choice of delegates. [Citations omitted.] (American Bar Association, "Amendment of the Constitution by the Convention Method Under Article V", p. 17.)

IX. Section-by-Section Analysis

Section 1—Title

Section 1 states that the Act is to be referred to as the "Constitutional Convention Implementation Act of 1985".

Section 2—Applications for constitutional convention

Section 2(a) specifies that States desiring a "limited" constitutional convention pursuant to article V of the Constitution shall adopt a resolution conforming with the provisions of this Act. A "limited" convention is defined as one for the "purpose of proposing one or more specific amendments" to the Constitution. Such a convention is to be distinguished from a "general" convention in which a more comprehensive review of the Constitution is contemplated and concerning which a bill of particulars is unfeasible. A "limited" convention under this section may be called to consider as many specific subject areas as the States are inclined to consider, provided only that such areas are explicitly outlined in the convention applications submitted to the Congress. On the other hand, a "general" convention may, in fact, propose but a single amendment; the application for such a convention, however, will not have prospectively limited the deliberations of the convention to that

subject area. In other words, it is the convention applications (and ultimately the convention call by Congress) that determine whether a convention is "limited" or "general", not the actual product of the convention.

An application for a convention under this Act is more than a mere expression of interest in constitutional change or an expression of opinion on the merits of such a change. Rather, it constitutes a formal request to the Congress for the convening of a constitutional convention under article V for the purpose of proposing amendments to the Constitution. A simple petition or memorial to the Congress would not constitute the kind of application contemplated by either the Constitution or this Act.

Section 2(a) requires any application for a "limited" convention to specify the "subject matter" of the amendment or amendments to be considered and conceivably proposed by the convention. While this is a standard that is incapable of being defined with precision, it should be emphasized that it is a limiting standard. It is not intended to preclude a State from submitting a more specific rather than a less specific application and Congress from formulating an equally specific resolution. It is designed only to ensure that a State is able to articulate the subject matter for consideration in a manner considerably less broad than that which would effectively constitute a call for a "general" convention.

The requirement that the application specify the "subject matter" of the amendments to be considered is designed to enable the Congress to determine whether there is a consensus among two-thirds of the States on the nature of the problem warranting possible constitutional amendment. See infra section 6(a). It is not intended that the "subject matter" requirement obligate a State to specify the precise text of a desired amendment or even that it describe in detail the substantive provisions sought to be included. If, for example, a State intended an amendment to the Constitution to limit the tenure of Members of Congress, it would be unnecessary to specify the full variety of details that might be involved in such an amendment (e.g., specific terms of years, contrasting treatment of Senate and House of Representatives, transition periods, etc.). It would be sufficient for purposes of this section for the States simply to apply for a convention to consider an amendment relating to "terms of Congressional office" or "Congressional tenure".

On the other hand, it is intended that the "subject matter" requirement obligate the State to be as precise and as specific as resonably possible in describing the intended amendment. It would probably be insufficent for purpose of this section for a State desiring an amendment relating to congressional tenure to call for a convention on the subject of "Congress" or "Article I of the Constitution."

Ideally, the "subject matter" standard is designed to promote a deliberative convention but one that will be deliberative with respect to relatively circumscribed grievances. The recognition by each State of its need to have its application aggregated with those of 33 other States (with 50 States in the Union) is expected to suffice generally to ensure that applications are not phrased in unnecessarily narrow terms. It is expected further that the Congress will act in a manner consistent with the purpose and spirit of article V

to ensure that applications are not phrased in excessively broad terms.

Section 2(b) clarifies what is implicit in section 2(a)—that the procedures established in this Act apply only to applications for "limited" conventions. While nothing in article V (or this Act) prevents the States from calling for a "general" convention, the procedures contained in this Act would not be controlling for such a convention. It is the view of the Committee that different considerations and procedures would govern a convention designed to effect more comprehensive changes in the Constitution. Applications for a "general" convention cannot be aggregated under this Act with applications for a "limited" convention.

It should be emphasized again that this Act does not create authority in the States to initiate any form of convention: rather, this is their constitutional right under article V, with or without the present measure. The "Constitutional Convention Implementation Act" simply establishes procedures to ensure that a call for a "limited" convention is attended by a minimum amount of confusion and uncertainty. It does not seek to impede or obstruct a "general" convention if that is the genuine desire of the States; it merely remains silent with respect to procedures for such a convention.

Section 3—Application procedure

Section 3(a) states that the procedures to be followed by a State in making or withdrawing an application are to be those established by the States themselves. Many States have already established such procedures. Although the act of applying for a constitutional convention has been determined to be a "federal function", *Hawke* v. *Smith No. 1,* 253 U.S. 221, 230 (1920); *Leser* v. *Garnett,* 258 U.S. 130, 137 (1972), it is also true that article V explicitly contemplates that the principal actor in the process of applying for a convention will be the State legislatures themselves. The committee believes that article V anticipated that the legislatures would operate as corporate and deliberative bodies in a manner identical to that in which they perform their other governmental functions. In fact, the Congress has never attempted to set forth constitutional convention application or ratification procedures in the past with the States having traditionally determined their own procedures in this regard.

While a State would, of course, be free to specify application procedures identical with normal procedures for enacting legislation, they would also be free to establish more rigorous procedures. See, e.g., *Dyer* v. *Blair,* 390 F. Supp. 1291 (N.D. Ill. 1975), written by the then future Supreme Court Justice John Paul Stevens. Given the significance of the application process in securing constitutional change, however, it would not be unreasonable for a State legislature to adopt procedures making it more difficult to apply for a convention than to pass a simple statute. This judgment would be left to the State legislature itself. In applying for a convention, the State legislature would have to act as a State legislature. The actions of a single House of a bicameral legislature would be ineffective in taking action of significance under this act.

The sole exception in section 3(a) to the principle of State autonomy in establishing its application procedures relates to the role of

the State Governor in this process. Section 3(a) renders unnecessary the assent by the Governor in the application (or withdrawal) process, although the Governor would continue to have whatever other role was provided him by the State in the initial legislative determination of application procedures.

In determining the meaning of "legislatures" in article V, the Committee has concluded that the Framers intended to preclude participation by the executive branch of the States. In *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798), it was argued that the 11th amendment to the Constitution was invalid in that the joint resolution passed by the Congress proposing the measure to the State was never submitted to the President for his approval. In responding to this argument, the Court stated:

> There can, surely, be no necessity to answer that argument. The negative of the President applies only to ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the Constitution. (3 Dal. 380.)

The Committee believes there to be an analogous situation between the role of the national executive in the proposal of amendments to the States for ratification and the role of the State executive in the process leading to the proposal of amendments by constitutional convention.[9]

Further, in *Hawke* v. *Smith No. 1,* 253 U.S. 221 (1920), the Supreme Court again distinguished between the normal legislative process under the Constitution and the legislative processes contemplated by article V. In reviewing the propriety of a provision of Ohio law making subject to popular referendum the ratification of any proposed constitutional amendment by the Ohio Legislature, the Court stated:

> What ["Legislatures"] meant when adopted it still means for the purposes of interpretation. A Legislature was then the representative body which made the laws of the people . . . [The ratification of a proposed amendment] was not an act of legislation within the proper sense of the word . . . (253 U.S. 227.)

Again, the Committee believes there to be an analogy between the concept of "Legislatures" in article V for purposes of ratification and the term's meaning in the context of the application process, and that State executives—as with the National executive—are constitutionally absent from the amendment process. *Cf., Smiley* v. *Holm,* 285 U.S. 355 (1932).

Section 3(b) states that controversies relating to the fact of compliance by a State with its own rules and procedures (established pursuant to section 3(a)) are also to be resolved by the State itself as a general rule. This is consistent with the policy set forth by the

---

[9] One of the seminal works of scholarship on the amendment process remarked on this analogy in the context of the ratification proces:

"The most reasonable view would seem to be that the signature of the chief executive of a State is no more essential to complete the action of the legislature upon an amendment to the Federal Constitution than is that of the President of the United States to complete the action of Congress in proposing such an amendment." (Ames, "The Proposed Amendments to the Constitution of the United States During its First Century of History" (1896), p. 298.)

Supreme Court in *Field* v. *Clark,* 143 U.S. 649 (1892), in which the procedural requirements in the passage of legislation were deemed to have been properly satisfied when such legislation was certified correct by the appropriate presiding officers. Once certified, the fact of such action having been officially taken is immune from judicial scrutiny, even in the event of an obvious error in the legislation itself.

The rule in *Field* is simply a function of the fact that legislative bodies have the right to regulate their own proceedings and to have their legislative product accepted as valid exercises of authority when duly certified as adopted. Under this Act, there would, for example, be no authority in either the Congress or any other entity to challenge a convention application on the grounds that internal legislative timetables were not honored or because a quorum was allegedly absent at some juncture. The final certification of the application by a legislature's officers would render any such irregularities immune from attack as in the case of any other form of legislative action.

In view, however, of the essentially "federal function" being performed by the States in the application process, see also *Leser* v. *Garnett,* 258 U.S. 130, 137 (1922), the Committee has slightly qualified this general rule. The Congress itself would be authorized to resolve questions "concerning the fact of final approval of such resolution by no less than a majority vote of each House of such legislature". Thus, if it were alleged that an application pending before the Congress had been assented to by only a single House of a two-House legislature, or that it had been certified despite failing to secure a majority vote in one House, such a controversy would be within the authority of the Congress to address and resolve.

Section 4—Transmittal of applications

Section 4(a) requires the appropriate officers within a State to submit its convention application to the President of the Senate and the Speaker of the House of Representatives within a period of 30 days following the effective date of the application. It is conceivable that the effective date of an application might be different than the date on which the application was certified by the State, if that were provided within the terms of the resolution containing the convention application.

Section 4(b) sets forth several elements of the convention application designed to clarify for both the Congress and the States the fundamental character of the convention application. The application is to contain a title, a text signed by the presiding officer of each House of the Legislature, an adoption date, and a certification by the appropriate State officer. In addition, the application may contain a listing of pending convention applications by other States calling for conventions on a similar "subject matter". While the listing contained in such applications would not be binding upon the Congress in the determination of which applications were to be aggregated with each other, see *infra* section 6(a), it is expected nevertheless that such listings will be helpful to the Congress in determining the intent of the States in calling for a convention, and whether there are sufficient applications on the same "subject matter".

Section 4(c) requires the President of the Senate and the Speaker of the House of Representatives, within the 10-day period following the receipt of a State application, to report to the Senate and House of Representatives, respectively, on this fact and to attempt an initial categorization of the application's "subject matter". Copies of the application are to be sent to the presiding officers of each State legislature and to each Member of Congress. In presenting any listing of States with whose convention applications they concur pursuant to section 4(b), the States would presumably have as their basis all other pending convention applications in their possession.

It is to be emphasized that the Initial determination by the presiding officers of the Congress of the "subject matter" of pending applications, and "the number of States then having made application on such subject", is not ultimately binding upon the Congress. It is only when Congress subsequently reviews the collective applications of the States pursuant to section 6(a), *infra*, that it can be determined whether there are sufficient applications on the same "general subject" to trigger the calling of a convention.

The purpose of the preliminary categorization by the President and the Speaker is principally to apprise the Congress when the formal aggregation decision is imminent and, perhaps, to limit the extent of highly politicized decisions at that later juncture. Presumably, the initial categorization decision by the President and the Speaker will be more mechanical and less politically oriented than later decisions taking place in a far more charged legislative environment.

The time limits contained in this section, as well as in other sections, are intended to apply to those periods in which the Congress is in session.

Section 5—Effective period of application

Section 5(a) relates to the effective period of convention applications. The need to establish some limits on the lifespan of an application is implicit in the notion that the article V amendment process is designed to ensure the existence of "contemporaneous consensus" as a precondition to constitutional change. *Dillon* v. *Gloss*, 256 U.S. 368, 374 (1921). As the Court observed in *Dillon:*

> We do not find anything in the article which suggests that an amendment once proposed is to open for ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. (256 U.S. 374.)

The Committee believes that the principles enunciated in *Dillon* v. *Gloss* are equally relevant in the case of State applications to the Congress for a constitutional convention under article V.

Section 5(a) establishes the general rule that an application submitted by a State shall remain effective for a period of no longer than 7 calendar years. A State, however, may specify in its application that it desires such application to be effective for a shorter period of time. In the event that a State fails to specify an effective period, it shall be considered to be valid for a 7-year period. A 7-year period of time is selected both because it is considered a

reasonable period of time for an application to be considered "contemporaneous" with later applications, and because it is the period of time that has been specified (in either the text or proposed resolution) for every successful amendment to the Constitution since the 18th amendment in 1919 (with the exception of the 19th amendment.)

A State would be permitted to withdraw or rescind an effective application at any time prior to that time at which there were applications from two-thirds of the States pending before Congress calling for a convention on the same "subject matter". A State would be free also to have its application automatically become invalid upon the happening of a particular contingency, such as the proposal by the Congress of its own amendment on the same subject matter.

Section 5(a) also contains a "grandfather clause" for those applications pending before the Congress as of the effective date of the "Constitutional Convention Implementation Act". This provision is designed to redress what would otherwise be the potential inequity of rendering a State application null and void immediately upon passage of the Act despite the absence of any prior legislative guidance to the States as to the effective period of their convention applications. This objective, however, is balanced by the policy underlying this section which is to rule invalid those applications which can fairly be characterized as "stale". Applications which have, at the time the present Act becomes law, been pending before the Congress for a period of no more than 12 years will remain effective for a period of not less than 2 additional years. In other words, as a transition policy, those applications which have been pending for between 5 and 12 years as of the Act's effective date will be effective for 2 additional years while those applications pending for less than 5 years will be effective for the normal period provided by this section. Applications which have been pending for more than 12 years will immediately be rendered null and void.

Section 5(b) specifies that a State may withdraw its application (up to that point at which two-thirds of the States have applications on the same subject matter pending before the Congress) through the same procedures by which it originally submitted the application under sections 3 and 4 of this Act. In *Coleman* v. *Miller,* 307 U.S. 433, 448 (1939), in what is admittedly a confusing plurality opinion, the Court suggested that the question of whether or not a State could rescind its prior ratification of a constitutional amendment (up to that point at which three-fourths of the States concurred in ratification) was a "political question" over which Congress had the ultimate power of constitutional interpretation.

Despite the fact that the Congress has not always been supportive of State efforts to rescind earlier ratifications, see H.J. Res. 638, 95th Congress (ERA rescission invalid), there are legitimate distinctions between the ratification and application processes that may well justify differing treatment in the search for consensus. As observed in a document of the House of Representatives more than a quarter of a century ago:

> In the one instance, in a State application, only an initiating action is sought with no one finally committed to the

> substantive provision contained in the application, not even the State which submits it. In the other instance, Congress has completed its work and is committed to the position outlined in the proposed amendment. Further, many States submit applications for the sole purpose of prodding Congress into taking action on a proposed amendment pending in the Congress, without having the slightest hope that Congress will can a convention. To hold them bound to their petitions would not be a politic or realistic approach. ("Problems Relating to a Federal Constitutional Convention," Committee on the Judiciary, U.S. House of Representatives, 88th Congress, 1st Session (1957), p. 46.)

In order then to establish the constitutional convention application process as one designed to ascertain the existence of a national consensus in support of some form of constitutional change, the Committee believes that it is appropriate for States to have the ability to reconsider their applications and to be able to withdraw pending applications in the event of changing circumstances (and changing politics) rather than to be "dragged kicking and screaming" into an artificial consensus.

To the extent also that applications are designed merely to prod the Congress into acting on a constitutional amendment on its own, it would be dubious policy to prohibit the State from withdrawing its application if the Congress in fact acts.

Section 6—Calling of a constitutional convention

Section 6(a) establishes general procedures by which the Senate and House of Representatives are to consider whether there are sufficient applications to require that a convention be called under article V. It is the responsibility of the Secretary of the Senate and Clerk of the House of Representatives to maintain complete records on all State applications and to monitor the number of applications calling for conventions on a particular subject matter, see *supra* section 4(a). Whenever it is determined whether there may be applications from two-thirds of the States with respect to the same subject matter, they are to report this fact within 5 days to the presiding officers of their respective Houses.

Within the next 5 days that each House is in session, the presiding officer is to announce the substance of the report by the Secretary and the Clerk to the full body. Following this, each House is to make a formal determination as to whether there are a sufficient number of State applications calling for a convention on the same subject matter.

In reality, there are three separate, albeit related, decisions confronting Congress at this juncture. First, the Congress must determine whether there is no dispute over the fact of final State legislative passage of the application itself, see *supra* section 3(b). Once it is satisfied that there are no procedural irregularities in this regard, the State application becomes a fully valid application under article V. Whatever subsequent determinations Congress makes with regard to the application, it remains a valid application for the duration of time specified in section 5(a).

Second, the Congress must determine whether the application calls for a "limited" convention pursuant to section 2(a), i.e., one for the purpose of proposing one or more specific amendments to the Constitution. If it determines that the State is calling instead for a "general" or unlimited authority convention, although the application remains a valid and effective application for a convention, it is not one within the scope of this Act. If, the Congress concludes, however, that the State is applying for a convention to consider one or more discrete constitutional amendments, i.e., a "limited" convention, it is confronted with what will likely be the most difficult of its decisions.

The third and final judgment to be made by the Congress relates to whether there are a sufficient number of States (two-thirds) that are applying for the same kind of "limited convention". That is, the Congress must determine that the applications of a requisite number of States evince a reasonable enough similarity to justify being aggregated with one another for purposes of triggering a constitutional convention. Necessarily, this will be a subjective, quasi-judicial decision to be made by individual Members of Congress. In making this decision, it would be appropriate to consider a variety of factors including: (a) the specific text of the applications; (b) the listing of compatible State applications contained in the application itself, see *supra* section 4(b)(2); (c) the perceived defects in the Constitution motivating the applications; (d) the provision of provisions of the Constitution sought to be amended; and (e) the range of conceivable amendments that might be proposed by a convention that would satisfy the concerns of the States.

It is not necessary that the applications of States be identical in order to be combined or aggregated, or even that there be any degree of similarity between the terms and phrases used. The overall question to be asked by the Congress is: "Are these States in reasonable agreement as to the focus of the proposed convention?" If they are, the convention is to be called. If they are not, it is not to be called.

While the concept of "subject matter" offers the States leeway on the form in which they define the issues to be considered at a convention, the Congress would be acting in a reasonable manner if it refused to aggregate applications which, although technically on the same "subject-matter", focused upon entirely contradictory grievances. If, for example, one State explicitly applied for a convention to consider an amendment to strengthen the constitutional role of Congress in declaring war and another in order to consider an amendment to diminish that role, it would be reasonable for the Congress to refuse to aggregate them even though they can both be described as dealing with the specific subject matter of Congress' authority under article I, section 8, clause 11 of the Constitution.

If the Senate or House of Representatives concludes that there are an adequate number of States calling for the same kind of "limited" constitutional convention, it is then that body's obligation within 45 calendar days of the original receipt of the Secretary's/Clerk's report to agree to a concurrent resolution calling for the convening of such a convention. As Alexander Hamilton makes clear in *The Federalist, No. 85,* the language of article V ("shall call a convention") "obliges" the Congress to call a convention upon the

receipt of convention applications by two-thirds of the States. See *supra* note 2. There is no discretion in the Congress once it has made its threshhold determination on the existence of valid and aggregable applications for a "limited" convention from two-thirds of the States.

Section 6(a) finally provides that the concurrent resolution shall designate the place and time of meeting of the convention, as well as a statement of the subject matter that is to constitute the agenda of the convention. Such resolution is to be transmitted to the Governor and presiding legislative officers of every State of the Union, without regard to whether the State applied for a convention. As in other aspects of the article V amendment process, the requirement that Congress call the convention by concurrent resolution makes clear that the President is not to be involved in the act of calling the convention. *Hollingsworth* v. *Virginia*, 3 Dall. 378 (1798).

Section 6(b) requires the convention to be convened within 8 months of the final adoption by the Congress of the concurrent resolution in section 6(a).

Section 7—Delegates

Section 7(a) apportions to each State the same number of delegates to a convention called under article V and this Act as it is entitled Members of both Houses of Congress. Thus, for example, as a result of the 1980 apportionment, California would be entitled to 47 delegates and New Hampshire to 4 delegates. Each State would be required to elect by popular vote two delegates on an at-large basis (representing the number of Members of the Senate) and the remainder of its delegates on a congressional district basis (representing the number of Members of the House of Representatives). In all other respects, State laws relating to elections and voting would be followed in selecting delegates, except that Members of Congress or other persons "holding an office of trust or profit under the United States" shall not be elected as a delegate. *Cf.*, article I, section 6, clause 2, U.S. Constitution.

A variety of different principles of apportionment have been proposed with respect to a constitutional convention. These range from providing each State with an equal number of delegates (as occurred at the original Constitutional Convention called under the auspices of the Articles of Confederation) to providing each State with the same number of delegates as it has Members of the House of Representatives to a pure apportionment of "one-man, one-vote".[10] For most of the reasons that motivated the Founding Fathers in their compromises on the structure of the Legislative Branch of Government, the Committee believes that the Federal structure of our Nation ought to be reflected in the constitutional convention with representation being based partly upon population and partly upon the fact of Statehood.

---

[10] Apportioning delegates purely on the basis of representation in the House of Representatives would not constitute an unequivocal application of "one-man, one-vote" because each State, regardless of size, is entitled to at least one Member of that body. Article I, section 2, clause 3. The original version of Senator Ervin's legislation, S. 2307 (90th Congress) provided one convention vote per State.

In particular, it believes this to be an appropriate method of representation because it would place the Convention *in pari materia* with the only other institution of Government authorized to propose amendments to the Constitution—the U.S. Congress.

The Committee also believes that the solicitude shown by the drafting convention to the smaller States in article V in protecting the "equal suffrage" of States (language drafted contemporaneously with the final provision on amending conventions) suggests an intent not to deny smaller States a role in the convention similar to that in the Congress.

Any vacancy occurring in a State delegation following the election process is to be filled by appointment of the legislature of the State.

Section 7(b) provides that the roster of elected delegates within each State shall be certified by the secretary of state (or other appropriate official) and transmitted to the President of the Senate and the Speaker of the House of Representatives.

Section 7(c) provides for representation of the citizens of the District of Columbia at any constitutional convention under article V on the same basis "as if the District were a State". The Constitution, on the other hand, is express in denying the District a role either in applying to the Congress for a convention or in ratifying the product of any convention. While the Committee believes that providing for representation for the District at a convention on an equal basis with the States is within the power of the Congress, some Members expressed concern that this was not constitutionally permitted. For this reason, a severability clause is explicitly included as section 17. Should the courts disagree with the Committee's determination that such constitutional authority exists within the Congress, that finding will not impair the validity of the remainder of this Act.

Section 7(d) extends to convention delegates, for the duration of the convention, the same protections afforded by article I, section 6, clause 2 to Members of Congress relating to immunity from arrest and prosecution in connection with their official responsibilities. It is not the intent of this provision to bar Federal employees generally from serving in this capacity. See *In Re Corliss*, 11 R.I. 638, 643 (1876).

Section 8—Convening the convention

Section 8(a) provides that the convention shall be formally opened by the President of the Senate and the Speaker of the House of Representatives acting jointly. They are to administer the oath of office to delegates and preside until the convention elects its own presiding officer. The oath to be subscribed to by the delegates commits them, during the course of the convention, to comply with the Constitution of the United States (as well as the provisions of this Act to the extent that they reflect Congress' interpretation of what article V of the Constitution means).

Subsequent proceedings of the convention shall be conducted in accordance with the rules adopted by the convention itself provided they are not inconsistent with any provision of the Constitution or this Act. See *infra* section 9. These include rules relating to forms of parliamentary procedure, necessary quorums, committee proce-

dures, requisite votes for the floor amendments and proposed constitutional amendments, and disciplinary policies. Such rules, however, must be adopted by a vote of three-fifths of the total number of delegates who have subscribed to the oath of office (not merely three-fifths of a designated quorum).

Section 8(b) authorizes the appropriation of "such sums" as may be necessary for the payment of the expenses of the convention. This would include necessary travel expenses for delegates as well as a pro-rata salary payment to delegates equivalent to the annual salary level accorded Members of Congress. In the event, however, that such sums were not forthcoming from the Congress in a timely manner, or were subject to unacceptable conditions, the convention is authorized to apportion its own costs among the States in a manner of its choosing.

Section 8(c) requires the General Services Administration to assist the convention by providing it with necessary facilities. It also states that, upon written request of the presiding officer of the convention, other executive agencies and departments are to provide such reasonable technical and other assistance as may be needed by the convention.

Section 9—Procedures of the convention

Section 9(a) prohibits so-called "unit rule" voting at the convention, and establishes the convention as a body of fully deliberative delegates, with each delegate entitled to a single vote.

Section 9(b) requires the convention to keep a daily verbatim record of its proceedings, akin to the Congressional Record, and to make public those proceedings in a timely manner. All delegate votes shall be entered into this record in a manner accessible to the public.

Section 9(c) requires that the convention terminate its proceedings, whether or not any amendments have been proposed, within 6 months from the time it was convened unless, following a formal request from the convention itself, Congress extends the life of the convention through concurrent resolution for a time certain. Again, the President of the United States would not be involved in the extension process.

Section 9(d) requires the presiding officer of the convention to transmit the full record of official proceedings of the convention to the National Archives within 30 days after the termination of the convention.

Section 10—Proposal of amendments

Section 10 states explicitly what is implicit in the concept of a "limited" convention—that the convention is without authority to propose any amendment or amendments of a subject matter different from that set forth in the concurrent resolution calling the convention. See *supra* section 6(a). In other words, the convention, although a sovereign body, is subject to the limitations of its constitutional charter—the concurrent resolution by Congress—which itself merely reflects the intent of two-thirds of the States in applying for the convention in the first place.

A convention which proposed an amendment not within its charter, i.e., the concurrent resolution, would be acting in an ultra vires

manner and without legal or constitutional authority and would be subject to the sanctions contained in section 11(b) *infra*. For a more detailed discussion of the fundamental question of whether a "limited" convention is contemplated under article V, see the discussion *supra* in section VIII. Given the propriety of a limited convention, there can be little doubt that the policy contained in this section is a necessary and appropriate one.

Section 11—Approval by the Congress and transmittal to the States for ratification

Section 11(a) requires the presiding officer of the convention, within 30 days following its termination, to submit to the Congress the exact text of any amendment or amendments agreed upon by the convention. The principle reasons for routing the product of the convention back through the Congress rather than directly to the States for ratification are (a) to provide an effective enforcement mechanism to ensure that the convention does not act outside the scope of its authority. See *supra* section 10; and (b) to enable the Congress pursuant to article V to determine the appropriate mode for ratification. See *infra* section 11(b).

Section 11(b) provides that the Congress shall act "in as expeditious a manner as possible", but in any case within 6 months following the receipt of any proposed amendment or amendments from the convention under section 11(a). There are two general options available to the Congress: First, if it concludes that the convention has acted within its proper ambit of its authority, the Congress is required to forward the proposed amendment or amendments to each of the States for ratification. In addition, it is to select a mode of ratification by the States—State legislatures or State conventions—as well as the time period for ratification. See *Dillon* v. *Gloss*, 256 U.S. 368 (1921), provided that neither the amendment nor any accompanying resolution approved by the convention contains its own time period. The ability of the convention to establish time periods for ratification would be limited in the same manner as Congress' ability is limited in the same regard, see *supra Dillon* v. *Gloss; Coleman* v. *Miller*, 307 U.S. 433 (1939). In the event that the convention does not set a time period for ratification, Congress would be prohibited from setting a time period of less than 4 years.

The second option available to the Congress arises if the convention is in violation of section 10 of this Act in proposing an amendment or amendments outside the scope of Congress' concurrent resolution in section 6(a). In the event that the convention does act in such an ultra vires manner, the Congress may by concurrent resolution so state and refuse to direct the submission of any such amendment or amendments to the States. Disagreement on this issue among the Senate and House of Representatives would effectively constitute an action equivalent to a concurrent resolution under 11(b)(ii) refusing to submit a proposition to the States.

Under section 11(b), the Congress would be required to treat each proposed amendment separately. If the convention, for example, proposed one amendment within the scope of its charter and one outside of it, the Congress would be required to submit the former amendment to the States under section 11(b)(i) and to refuse to

submit the latter amendment under section 11(b)(ii). There would be no authority within Congress, however, to treat the provisions of any single amendment as severable.

Section 11(c) provides that if, within the time period specified in section 11(b), the Congress does not approve a concurrent resolution forwarding a proposed amendment or amendments to the States for ratification, any State may commence an action under section 15 of this Act within 30 days seeking a declaration by the Supreme Court that the proposed amendment or amendments are consistent with Congress' concurrent resolution and directing the submission of the amendment or amendments to the States for ratification.

Section 11(d), however, stays the effective period of such an order under section 11(c) for 30 days in order to give the Congress an additional period within which it can perform its responsibilities to set forth the mode of ratification and the time period for ratification (provided that the amendment or its accompanying resolution fails to provide for such a period). Thus, although the Congress may be in disagreement with the Court on the question of whether the convention acted within its authority, it is still empowered to carry out its explicit function under article V relating to the mode of ratification as well as its implicit function relating to ratification deadlines.

Section 11(e) specifies that if the Congress has not affirmatively acted, within 30 days to carry out its authority under section 11(d), that the order of the Supreme Court under section 11(c) shall be accompanied by a requirement that the proposed amendment or amendments be ratified through the State legislative process (as opposed to the State convention process) and that the effective time period for ratification be 7 years, unless the amendment or its accompanying resolution states differently.

The principal objective of the procedure outlined in section 11 is to ensure that a full range of constitutional checks and balances be applied to the convention process: if the convention acts outside its purview, it will be checked by the Congress; if the Congress abuses its reviewing authority, it will be checked by the courts; if the courts abuse their discretion, the ultimate check—that imposed by the States through the ratification process—will be applied through section 12 *infra* (State ratification).

The Committee recognizes the difficult issue presented by section 11(e) wherein the Congress sets forth in advance a particular mode of ratification under certain circumstances. The Committee believes, however, that it would be equally difficult for the Congress to absolutely obstruct the constitutional convention amendment process—over the objections of the States, the convention, and the Court—as an incident of its authority to choose a mode of ratification. It believes that it is implicit in article V that the Congress will exercise its ministerial and other responsibilities in a manner consistent with the objectives of article V. If it does so, there will be no need ever to resort to section 11(e). If Congress refuses to exercise such responsibilities, however, the Committee believes that some alternative procedure for setting the mode of ratification is implicit in article V in order that the convention method of amendment not be rendered meaningless. This view is strengthened by

the realization that the convention method of amendment will be resorted to most commonly in the case of proposed amendments that are disapproved by the Congress perhaps because they would limit certain constitutional powers or authorities of the Congress. It cannot have been the intent of the drafters of article V that Congress be capable of standing intransigently in the way of this process by virtue of its responsibilities with respect to selecting the mode of amendment ratification.

Section 12—Ratification of proposed amendments

Section 12(a) states what is already explicit in the Constitution that amendments proposed by the convention and submitted to the States for ratification are to become part of the Constitution when ratified by three-fourths of the States in the manner specified by the Constitution and within the specified time period.

Section 12(b) states that the secretary of state within each State (or any other appropriate officer) shall transmit certified copies of amendment ratifications to the General Services Administration. Any proposed constitutional amendment, however, effectively becomes part of the Constitution immediately upon ratification by the requisite number of States, not when certified by the General Services Administration. *Dillon* v. *Gloss,* 256 U.S. 368, 376 (1922). The procedure set forth in this section is purely for matters of administrative convenience.

Section 13—Rescission of ratifications

Section 13(a) specifies that a State may rescind an earlier ratification of any amendment proposed by a "limited" constitutional convention by procedures equivalent to those by which it originally ratified such amendment, or else through other procedures specified by the State. A State may no longer rescind an earlier ratification, however, once there are existing, valid ratifications of a given amendment by three-fourths of the States since at that point the amendment immediately becomes part of the Constitution.

Although the Congress has in the past looked askance upon the idea of rescission of amendment ratifications in particular contexts, see, e.g., H.J. Res. 638, 95th Congress, there is nothing in the Constitution which deals explicitly with this issue. In *Coleman* v. *Miller,* 307 U.S. 433 (1939), the Court by a plurality opinion seemed to suggest that the question of ratification following rescission (as well as the reverse) was a "political question" in which Congress was to play a primary role in interpreting the requirements of the Constitution, specifically those of article V in this instance. In the belief that allowing rescission (a) will better ensure the existence at any given moment of an actual consensus among the States in favor of a particular constitutional amendment; (b) will better protect the inherent right of a legislative body to reconsider its earlier actions; and (c) will better enable the States to respond to changing circumstances, the Committee believes that it is the better policy to allow a State to rescind an earlier ratification up to that point at which an amendment secures the ratification of three-fourths of the States.

Section 13(b) essentially states the corollary of the principle in section 13(a). A State may ratify an amendment even though it has

earlier rejected that amendment, or has rescinded an earlier ratification of that amendment.

The general policy then in section 13 is to ensure maximum freedom of action by State legislatures in the ratification process. As circumstances change, and as political fortunes ebb and flow, it may well be that a State will reconsider an earlier decision as to the desirability of a proposed amendment. So long as the overriding objective of the article V process is the determination of whether a "contemporaneous consensus" exists in behalf of some amendment, it is difficult to understand the principle which would militate in opposition to this policy. The policy set forth in section 13 is applicable only to the ratification of amendments emerging from a "limited" constitutional convention pursuant to this Act.

Section 14—Proclamation of constitutional amendments

Section 14 requires the Administrator of the General Services Administration to issue a proclamation that an amendment has become part of the Constitution when he is in receipt of the certified ratifications of three-fourths of the States. As already noted, however (see *supra* section 12(b)), the amendment actually becomes part of the Constitution immediately upon the ratification of the last State necessary to satisfy the three-fourths requirement, *Dillon* v. *Gloss,* 256 U.S. 368 (1922). The procedure in this section is for the purpose of ensuring a formal certification of this fact; it is not a precondition to an amendment becoming effective.

Section 15—Judicial review

Section 15(a) authorizes any State dissatisfied with Congress' judgements under section 6 or section 11 to bring an action in the Supreme Court against the Secretary of the Senate, the Clerk of the House of Representatives, or "such other parties as may be necessary to afford the relief sought". Such action is to be given priority on the Court's docket. Section 15(a) principally contemplates declaratory relief as a judicial remedy and expects that the Court will utilize as a standard in overturning congressional decisions one evidencing some deference to the Congress.

Section 6 authorizes Congress to make basic decisions relating to the validity and aggregability of State convention applications, while section 11 authorizes Congress to make equally basic decisions relating to the validity of the amendments emerging from the convention. At both junctures, the Congress is in a position to make critical decisions relating to the process of amending the Constitution through the convention method. Given that one objective of this legislation is to restrict Congress in its ability to impede a convention which may well have been generated by congressional intransigence in the first place, it would be ironic if the Congress were empowered to make fundamental decisions on whether the convention process was to be effected without some check or limitation being placed upon that authority. Section 15 is designed to delineate a limit upon that authority by making clear that the normal system of constitutional checks and balances is to be applicable to this process. The Congress—the institution most likely to be the object of constitutional limits sought by a convention—ought

not to be positioned to undermine the convention as a function of its largely ministerial duties under section 6 and section 11.

Although it is anticipated that the principal beneficiary of the language in section 15(a) will be those States desiring to affirmatively facilitate the amendment to be proposed by a convention, it is conceivable that there may be circumstances in which States with contrary objectives may be afforded an avenue of relief by this language.

Section 15(b) requires that claims arising under this Act are to be barred unless suit is filed thereon within 60 days after such claim first arises. Normally, that would occur at the point at which Congress has either passed final judgement on some question or at which the time period has expired within which they were to render such judgement. To the extent that this legislation purports to interpret the interstices of article V, it is expected that the strictures of section 15(b) would also apply in the case of other closely related constitutional litigation.

Section 15(c) states that the right to review by the Supreme Court of issues arising under sections 6 and 11 does not limit or restrict any other right of judicial review (including Supreme Court review) in regard to questions arising under this Act, or any right of judicial review provided anywhere else in the Constitution or the laws of the United States. Section 15(c) attempts to make clear that the remedies in this section are in addition to those provided as a result of any other access by litigants to judicial review over the amending process.

The courts have already adjudicated numerous issues relating to the article V process despite the intimations about the "political question" doctrine in *Coleman* v. *Miller*, 307 U.S. 433 (1939). They have, for example, determined that there are no limitations upon the discretion of Congress to choose the State legislative method of ratification rather than the State convention mode, *United States* v. *Sprague*, 282 U.S. 716 (1931); that constitutional amendments do not require the signature of the President, *Hollingsworth* v. *Virginia*, 3 U.S. 378 (1798); that Congress may establish reasonable time limits for ratification, *Dillon* v. *Gloss*, 256 U.S. 368 (1921), that the States cannot make ratification of proposed amendments through popular referenda, *Hawke* v. *Smith No. 1*, 253 U.S. 231 (1920); that the two-thirds requirement in article V refers to two-thirds of a quorum rather than two-thirds of the entire membership of the Congress, *National Prohibition Cases*, 253 U.S. 350 (1920); and that official notice of ratification by the States are binding upon the courts, *Leser* v. *Garnett*, 258 U.S. 130 (1922). The Committee believes that this history, as well as the thrust of recent judicial decisions in the area of determining what constitutes a "political question", *Baker* v. *Carr*, 369 U.S. 186 (1962); *Powell* v. *McCormack*, 395 U.S. 486 (1969), suggest the need to avoid foreclosing judicial review of the constitutional convention process. The historical objectives of this process, in particular its function in enabling the States to check abuses of power by the national government, lend further evidence to the property of this policy.

The Committee believes that there are no constitutional impediments to the establishment of original jurisdiction in the Supreme Court over the controversies involved in sections 6 and 11, and that

such authority is contained in article III, section 2 of the Constitution, see, e.g., *South Carolina* v. *Katzenbach,* 383 U.S. 301, 307 (1966).

Section 16—Effective date of amendments

Section 16 specifies that a constitutional amendment is to become effective from the time specified therein or, if no such time is specified, 1 year after the date on which the amendment is ratified by the final State necessary to secure three-fourths ratification by the States. This departure from the procedure applicable to congressionally proposed amendments results from an amendment adopted in committee.

Section 17—Severability

Section 17 sets forth a "severability" provision largely in response to concerns expressed in Committee by some members about the inclusion of section 7(c) relating to participation by the District of Columbia at the convention. It is not, however, limited in its application to this provision.

X. Regulatory Impact Statement

Pursuant to paragraph 11(b), Rule XXVI, Standing Rules of the Seante, the Committee has concluded that the present bill will have no significant regulatory impact or impact upon personal privacy, and that its enactment would not create any significant additional paperwork.

XI. Cost of the Legislation

In accordance with paragraph 11(a), Rule XXVI, Standing Rules of the Senate, the Committee offers the following report of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 13, 1985.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 40, the Constitutional Convention Implementation Act of 1985, as ordered reported by the Senate Committee on the Judiciary, July 23, 1985. We estimate that costs to the Federal Government would be $4–5 million per month if the bill were enacted and a constitutional convention were convened in 1986, with a total cost of about $27 million if the convention were to last 6 months. The cost to State and local governments, if a special election were required, would total about $180 million.

S. 40 establishes procedures for the calling of Federal constitutional conventions under article V of the Constitution, for the purpose of proposing amendments to the Constitution. Under the bill, a State legislature may adopt a resolution stating that the legislature requests the calling of a convention under article V, and specifying the subject matter of any amendment. If either House of the

Congress determines that two-thirds or more of the States have submitted valid applications on the same subject matter, that House shall agree to a concurrent resolution calling for the convening of a Federal constitutional convention. Unless extended by concurrent resolution of the Congress, the convention shall terminate its proceedings within 6 months after convening.

S. 40 would result in costs to the Government only in the event that at least two-thirds of the States request such a convention on the same subject matter. In that event, a total of 538 delegates to the convention would be elected from the States. The bill authorizes the appropriation of such sums as may be necessary for the payment of the expenses of the convention, including payment to each delegate of necessary travel expenses and an amount of pay equal to that for a Member of Congress prorated for the term of the convention. If such sums are not appropriated in a timely manner, the convention is authorized to apportion its costs among the States. The Administrator of General Services shall provide such facilities as the convention may require.

It is not possible to predict the fiscal year in which these costs would occur. If a convention were convened in 1986, salaries and expenses paid to the delegates at Member salaries would total approximately $3.4 million per month. Assuming about 100 staff members, paid at an average annual rate of $26,000, monthly staff costs would total approximately $200,000. Approximately 35 of these persons would need about 1–2 months prior to the convention to make all of the necessary arrangements and perform the advance legal and research work, and 1 month after the convention is adjourned to finalize administrative and procedural details. This additional staff time would cost about $200,000. Round-trip airfare to the convention site for delegates is estimated to be about $150,000, assuming an average round-trip airfare of $200–300. Other expenses of the convention are expected to total approximately $800,000 per month.

Estimated total costs for a convention lasting 1 month would be about $4.8 million. Costs for each additional month would be about $4.5 million. State and local governments would also incur an additional expense of about $180 million if special elections were needed to select the delegates. The costs of electing delegates would not be significant if the elections are held in conjunction with regular State elections. The costs for the convention would be higher if it were held after 1986.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

ERIC HANUSHEK
(For Rudolph G. Penner, Director).

XII. CONCLUSION

For the foregoing reasons, the Committee on the Judiciary recommends the enactment of the immediate bill establishing procedures for calling a constitutional convention under article V of the Constitution of the United States.

APPENDIX A

ARTICLE V APPLICATIONS SUBMITTED SINCE 1789 [11]

This table is offered as a comprehensive compilation of Article V applications categorized by State and by application content. The table maximizes the number of applications, *i.e.*, whenever any source recognizes an application, it has been included in this table. For this reason it must be emphasized that the totals are valuable only as an overview and not for the purpose of determining whether two-thirds of the States have applied for a convention on any given category.

Allowing for slight semantic differences among the authorities consulted, the categories used are, for the most part, generally accepted. Any readily discernible differences are set forth in the notes below. A more serious problem is the sometimes sharp disparity among the sources consulted with regard to what should be recognized as an application. Rather than attempt to make definitive judgments as to what applications should be treated as such, we have set out in the notes below the generally recognized applications followed by the applications recognized by particular sources.

[11] Appendix A is taken from the appendix prepared by Barbara Prager and Gregory Milmoe for the 1974 study prepared by the American Bar Association's Special Constitutional Convention Study Committee, "Amendment of the Constitution Under the Convention Method Under Article V". It is followed by an update through July 1984 prepared by the Congressional Research Service of the Library of Congress.

Twenty Categories of Applications	ALABAMA	ALASKA	ARIZONA	ARKANSAS	CALIFORNIA	COLORADO	CONNECTICUT	DELAWARE	FLORIDA	GEORGIA	HAWAII	IDAHO	ILLINOIS	INDIANA	IOWA	KANSAS	KENTUCKY	LOUISIANA	MAINE	MARYLAND	MASSACHUSETTS	MICHIGAN	MINNESOTA
GENERAL										1			1	1			2						
DIRECT ELECTION OF SENATORS				3	3	1						2	3	1	4		1	1	1			1	2
ANTI POLYGAMY					1		1	1					1	1	1			1	1	2			
REPEAL OF PROHIBITION 21ST AMEND																					1	1	
LIMITATION OF FED TAXING RE PEAL 16TH AMEND	1			1		1		1	1	1		1	1	2	1		1	2	2	1		2	
WORLD FEDERAL GOVERNMENT					1		1		3						2			1					
LIMIT PRESIDENTIAL TENURE													1		1								
TREATY MAKING									1	1				1									
REVISION OF ARTICLE V				1				1	1			2	2	1		1						1	
EXCLUSIVE STATE JURISDICTION OVER SCHOOLS										3								1					
SUPREME COURT DECISIONS				1				1	1	1								1					
APPORTIONMENT	2	1	1	2	1	2		1	1	1		2	2	2	1	2	1	1		1			1
COURT OF THE UNION	1			1					1														
PRAYER IN SCHOOLS			1																1				
REGISTRATION OF PRES ELECTORS				1		1							1			1							
PRESIDENTIAL DISABILITY & SUCCESSION						1																	
REVENUE SHARING	1								1	2	1			1	1			2	1	1			
FREEDOM OF CHOICE OF SCHOOLS																		1	1		1		
PROHIBIT STATE OR MUNI BOND TAX										1								1					
MISC	3			1	3	1	1		1			2	1	2				2		3			
TOTALS BY STATE	6	1	2	11	9	7	3	3	12	9	1	9	14	9	10	9	5	13	6	6	6	7	4

MISSISSIPPI					1						1		1						2		2	7
MISSOURI	1	3							1				2								1	8
MONTANA		6	1		1		1						2			1					1	13
NEBRASKA		4	1		1								1			1	1					9
NEVADA		6		1	1								3						1			12
NEW HAMPSHIRE			1		2								1					1				5
NEW JERSEY	1	1		1	1	1												1			1	7
NEW MEXICO					1								1									2
NEW YORK	1		1	1																	2	5
NORTH CAROLINA	1	2				1							1									5
NORTH DAKOTA		1	1										2		1			1				6
OHIO	1	2	1															2				6
OKLAHOMA		1	1		1				1				2			1			1			8
OREGON	1	6	1															1			1	10
PENNSYLVANIA		1	2		1																1	5
RHODE ISLAND					1								1					1			1	4
SOUTH CAROLINA	1		1		1				1				2	1								7
SOUTH DAKOTA		3	1		1				3				2			1		1				12
TENNESSEE		4	1		1								1							1	1	9
TEXAS	1	2	1		1				2				2			1		1	1		3	15
UTAH		1			1								2			1						5
VERMONT			1																			1
VIRGINIA	2				1				1	1			2				1			1	1	10
WASHINGTON	1	1	2										1									5
WEST VIRGINIA			1															1				2
WISCONSIN	2	3	1	1	1		1									1					1	11
WYOMING		1			2				1				1	1							1	7
TOTAL APPLICATIONS BY SUBJECT	18	75	30	5	42	8	5	3	19	6	4	64	5	4	11	3	21	7	4	36	356	

A total of six sources were selected for consultation in the preparation of this table. They are:

Buckwalter, "Constitutional Conventions and State Legislators," 20 J. Pub. L. 543 (1971) [hereinafter cited as Buckwalter]; Graham, "The Role of the States in Proposing Constitutional Amendments," 49 A.B.A.J. 1175 (1963) [hereinafter cited as Graham]; E. Hutton, State Applications to Congress Calling for Conventions to Propose Constitutional Amendments (January 1963 to June 8, 1973), June 12, 1973 (Library of Congress, Congressional Research Service, American Law Division Paper) [hereinafter cited as Library of Congress Study]; Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong. 1st Sess. 115-18 (1967) [hereinafter cited as 1967 Hearings]; Tydings, Federal Constitutional Convention, S. Doc. No. 78, 71st Cong., 2d Sess, (1930) [hereinafter cited as 1930 S. Doc.]; and W. Pullen, "The Application Clause of the Amending Provision of the Constitution," 1951 (unpublished dissertation in Univ. of North Carolina Library) [hereinafter cited as Pullen].

It should be noted that certain of the studies consider only limited time periods and, therefore, were consulted only for the time periods indicated: Buckwalter (1788-1971); Graham (1788-1963); Library of Congress Study (1963-73); 1967 Hearings (1963-67); 1930 S. Doc. (1788-1911); Pullen (1788-1951).

General

Buckwalter, Pullen, 1930 S. Doc. and Graham were consulted. All sources cite: Ga. 1832; Mo. 1907; N.Y. 1789; Tex. 1899; Ga. 1788, Wis. 1929

Buckwalter, Pullen and Graham cite: Ill. 1861; Ind. 1861; Ky. 1861; Ohio 1861; Wash. 1901; Wis. 1911.

Buckwalter and Graham cite: Va. 1861.

Pullen cites: Ky. 1863, N.J. 1861; N.C. 1866; Ore. 1864; S.C. 1832.

Buckwalter apparently categorized 15 applications as "General" applications, which he also included in his "Direct Election of Senators" category. They are: Colo. 1901; Ill. 1903; Iowa 1907, 1909; Kan. 1901, 1905, 1907; La. 1907; Mont. 1911; Neb. 1907; Nev. 1907; N.C. 1907; Okla. 1908; Ore. 1901; Wash. 1903.

Direct election of Senators

Pullen, Graham, 1930 S. Doc., and Buckwalter were consulted. All sources cite: Ark. 1901, 1903; Cal. 1903, 1911; Colo. 1901; Idaho 1903; Ill. 1903, 1907, 1909; Ind. 1907; Idaho 1901 *; Iowa 1904, 1909; Kan. 1907; Ky. 1902; La. 1907; Me. 1911; Mich. 1901; Minn. 1901; Mo. 1901, 1905; Mont. 1901, 1905, 1907, 1911; Neb. 1893, 1901, 1903, 1907; Nev. 1901, 1903, 1907; N.J. 1907; N.C. 1901, 1907; Ore. 1901, 1903, 1909; Pa. 1901; S.D. 1901, 1907, 1909; Tenn. 1901, 1905; Tex. 1901; Utah 1903; Wash. 1903; Wis. 1903, 1907.

Pullen, Graham and Buckwalter cite: Ark. 1911; Iowa 1907; Minn. 1911; Mo. 1903; Mont. 1903; Nev. 1905; N.D. 1903; Ohio 1908, 1911; Okla. 1908 [1930 S. Doc. dated this application 1909]; Tenn. 1903; Tex. 1911.

---

* Graham, Pullen and 1930 S. Doc. note that this application proposed the direct election of the President and Vice President as well as Senators.

Graham, Buckwalter and 1930 S. Doc. cite: Kan. 1901; Wyo. 1895.

Graham and Buckwalter cite: Kan. 1905, 1909; Mont. 1908; Wis. 1908; Ore. 1907.

Pullen, Graham and 1930 S. Doc. cite: [As second applications] Ore. 1901, 1903.

1930 S. Doc. cites: [second applications] Iowa 1904.

Pullen cites: [second applications] Cal. 1911; Tenn. 1901; Nev. 1901; Iowa 1911; Ore. 1909.

Anti-polygamy

Pullen, Graham, Buckwalter and 1930 S. Doc. were consulted. All sources cite: Del. 1907; Ill. 1913; Mich. 1913; Mont. 1911; Neb. 1911; N.Y. 1906; Ohio 1911; S.D. 1909; Tenn. 1911; Vt. 1912; Wash. 1909; Wis. 1913.

Pullen, Graham, and Buckwalter cite: Cal. 1909; Conn. 1915; Iowa 1906; La. 1916; Me. 1907; Md. 1908, 1914; Minn. 1909; N.H. 1911; Okla. 1911; Ore. 1913; Pa. 1907, 1913; S.C. 1915; Tex. 1911; W. Va. 1907.

Graham and Buckwalter cite: N.D. 1907; Wash. 1910.

Repeal of prohibition

Pullen, Buckwalter and Graham were consulted. All sources cite: Mass. 1931; Nev. 1925; N.J. 1932; N.Y. 1931; Wis. 1931.

Limitation of Federal taxing power and repeal of 16th amendment

Graham and Buckwalter were consulted.[+] All sources cite: Ala. 1943 [r]; Ark. 1943 [r]; Del. 1943; Fla 1951; Ga. 1952 [(a)] *; Ill. 1943 [r]; Ind. 1943, 1957; Iowa 1941 [r], 1951; Kan. 1951; Ky. 1944 [r]; La. 1950 [r]; Me. 1941, 1951 [r]; Mass. 1941 [r]; Mich. 1941, 1949; Miss. 1940; Neb. 1949 [r]; N.H. 1943, 1951; N.J. 1944 [r]; N.M. 1951; Nev. 1960 [(a)]; Okla. 1955; Pa. 1943; R.I. 1940 [r]; Utah 1951; Va. 1952 [(a)] *; Wis. 1943 [r]; Wyo. 1939; S.C. 1962 [(a)].

Graham cites: Colo. 1963; La 1960 [(a)]; Md. 1939; Tex. 1961[(a)]; Wyo. 1959 [(a)].

World Federal Government

Pullen, Graham, and Buckwalter were consulted. All sources cite: Cal. 1949 [r]; Conn. 1949; Fla. 1949; Me. 1949; N.J. 1949 [r]; N.C. 1949 [r].

Graham and Buckwalter cite: Fla. 1943; 1945.

Limit Presidential tenure

Pullen, Graham, and Buckwalter were consulted. All sources cite: Ill. 1943; Iowa. 1943; Mich. 1943; Mont. 1947; Wis 1943.

Treaty making of the President

Pullen, Graham, and Buckwalter were consulted. All sources cite: Fla. 1945.

Buckwalter, and *Graham* cite: Ga. 1952; Ind. 1957.

[+] Packard. "Constitutional Law; The States and the Amending Process," 45 A.B.A.J. 161 (1959), limiting his discussion to this subject, lists applications (undated) from Idaho, Mont., S.D. and Tenn., none of which are cited by any other source.

[(a)] Repeal of 16th Amendment.

* *Graham* cites these as Repel applications while *Buckwalter* merely cites them as tax limitation applications.

[r] = Rescinded.

Revision of Article V

Buckwalter, Graham, and Library of Congress Study * were consulted. All sources cite: Ark. 1963; Fla. 1963; Idaho 1963; Ill. 1963; Kan. 1963[r], Mo. 1963; Okla. 1963; S.C. 1963; S.D. 1963; Tex. 1963; Wyo. 1963.

Buckwalter and Graham cite: Idaho 1957; Ill. 1953; Ind. 1957; Mich. 1956; S.D. 1953, 1955; Tex. 1955.

Buckwalter, and Library of Congress Study cite: Va. 1965

Give States exclusive jurisdiction over public schools

Buckwalter, Graham and Library of Congress Study were consulted.

Buckwalter and Graham cite: Ga. 1955, 1959.

Buckwalter and Library of Congress Study cite: Ga. 1965; La. 1965; Miss. 1965.

Graham cites: Va. 1960*

Supreme Court decisions

Graham was the only source consulted.

Graham cites: Ark. 1961; Fla 1957; Ga 1961; La. 1960.

Apportionment

Buckwalter, 1967 Hearings, and Library of Congress Study were consulted. All sources cite: Ala. 1965; Ariz. 1965; Ark. 1963, 1965; Colo. 1965; Fla. 1965; Idaho 1963, 1965; Ill. 1967; Ind. 1967; Kan. 1963[r], 1965[r]; Ky. 1965; Md. 1965; Minn. 1965; Miss. 1965; Mo. 1963, 1965; Mont. 1963, 1965; Neb. 1965; Nev. 1963, 1967; N.H. 1965; N.M. 1966; N.C. 1965; N.D. 1967; Okla. 1965; S.C. 1965; S.D. 1965; Tenn. 1966; Tex. 1963, 1965; Utah 1965; Va. 1964, 1965; Wash. 1963; Wyo. 1963.

Buckwalter and Library of Congress Study cite: Ala. 1966; Colo. 1967; Iowa 1969; Ill. 1965; N.D. 1965.

Buckwalter and 1967 Hearings cite: Ga. 1965; La. 1965; S.C. 1963.

Library of Congress Study and 1967 Hearings cite: S.D. 1963.

Buckwalter cites: Ind. 1957

Library of Congress Study cites: Alaska 1965; Cal. 1965; Nev. 1965; Okla. 1963; R.I. 1965; Utah 1963.

Court of the Union

Graham, Library of Congress Study, and Buckwalter were consulted. All sources cite: Ala. 1963; Ark. 1963; Fla. 1963.

Graham and Buckwalter cite: S.C. 1963; Wyo. 1963.

Prayer in schools

Buckwalter and Library of Congress Study were consulted. All sources cite: Mass. 1964.

Library of Congress Study cites: Ariz. 1972; Md. 1966; N.D. 1963.

---

* The Graham study continued through 1963, while the Library of Congress Study began in 1963.

[r] = Rescinded.

Redistribution of Presidential electors

Buckwalter, Graham, and Library of Congress Study were consulted. All sources cite: Ark. 1963; Kan. 1963[r]; Mont. 1963; Utah 1963; Wis. 1963.

Buckwalter and Library of Congress Study cite: Neb. 1965; Okla. 1965.

Buckwalter and Graham cite: Tex. 1963.

Buckwalter cites: Ill. 1967

While Buckwalter cites Colo. 1965 and S.D. 1965, Graham cites those applications as Colo. 1963 and S.D. 1963.

Presidential disability and succession

Library of Congress Study was the only source consulted. The study cites: Colo. 1965; Neb. 1965; Va. 1965.

Revenue sharing

Buckwalter and Library of Congress Study were consulted. All sources cite: Ala. 1967; Fla. 1969; Ill. 1965; Ohio 1965; Tex. 1967.

Buckwalter cites: N.H. 1969.

Library of Congress Study cites: Del. 1971; Fla. 1971; Ga. 1967; Iowa 1972; La. 1970*, 1971; Mass. 1971; N.J. 1970; N.D. 1971; Ore. 1971; S.D. 1971; Ohio 1971; W. Va. 1971.

Received by the Committee from the Attorney Generals of the respective States: Me. 1971; R.I. 1971.

Freedom of choice in selection of schools

Library of Congress Study was the only source consulted. The study cites: La. 1970; Mich. 1971; Miss. 1970, 1973; Nev. 1973; Okla. 1973; Tex. 1973.

Prohibit taxation of State or municipal bonds

Library of Congress Study was the only source consulted. The study cites; Hawaii 1970; La. 1970; Tenn. 1970; Va. 1970.

Miscellaneous

Alabama: 1833—Nullification: 1930 S. Doc. and *Graham*. Because the resolution of the Alabama Legislature was worded "This assembly . . . recommends to the Congress . . ." Pullen views it as merely a recommendation rather than a formal application. 1957—Selection of Federal Judges: Graham. 1959—Federal Pre-emption: Graham.

Arkansas: 1959—Examination of 14th Amendment Ratification: Buckwalter and Graham.

California: 1935—Federal Regulation of Wages and Hours: Buckwalter and Graham.

1935—Taxation of Federal and State Securities: Buckwalter, Graham, and Pullen.

1952—Distribution of Proceeds of Federal Taxes on Gasoline: Buckwalter and Graham.

---

[r] = Rescinded.

* The La. 1970 application was approved by its House of Representatives only.

Colorado: 1963—Direct Election of President and Vice President: Library of Congress Study.

Connecticut: 1958—State Tax on Income of Non-residents: Graham.

Florida: 1972—Replace the Vice President as Head of the Senate: Library of Congress Study.

Idaho: 1927—Taxation of Federal and State Securities: Buckwalter, Graham, and Pullen.

1963—Federal Debt Limit: Buckwalter, Graham, and Library of Congress Study.

Illinois: 1911—Prevention and Suppression of Monopolies: Buckwalter, Graham, and Pullen.

Indiana: 1957—Balancing the Budget: Buckwalter and Graham.

Louisiana: 1920—Popular Ratification of Amendments: Buckwalter, Graham, and Pullen.

1970—Sedition and Criminal Anarchy: Library of Congress Study.

Massachusetts: 1964—Pensions to Persons Over 65: Buckwalter and Library of Congress Study.

1967—Bible Reading in Public Schools: Library of Congress Study. Buckwalter cites this application as 1964.

1973—Public Funds for Secular Education: Library of Congress Study.

Mississippi: 1965—Control Communist Party in U.S.: Backwalter and Library of Congress Study.

1973—Prayer in Public Buildings: Library of Congress Study.

Missouri: 1913—Constitutionality of State Enactments: Buckwalter, Graham, and Pullen.

Montana: 1963—Direct Election of President and Vice President: Library of Congress Study.

New Jersey: 1965—Residence of Members of Congress: Library of Congress Study.

New York: 1965—Equal Rights for Women: Library of Congress Study.

1972—Public Funds for Secular Education: Library of Congress Study.

Oregon: 1939—Townsend Plan: Buckwalter, Graham, and Pullen.

Pennsylvania: 1943—Prohibition of Conditions in Grants-in-Aid: Buckwalter, Graham, and Pullen.

Rhode Island: 1790—Revision of Constitution: Graham.

Tennessee: 1972—Prohibit Interference with Neighborhood Schools: Library of Congress Study.

Texas: 1949—Tidelands Problem: Buckwalter, Graham, and Pullen.

1957—Oil and Mineral Rights: Graham.

1957—Preservation of States' Rights: Graham.

Virginia: 1973—Prohibiting Deficit Spending: Library of Congress Study.

Wisconsin: 1973—Right to Life: Received by the Committee from the Attorney General of the State.

Wyoming: 1961—Balancing of Budget: Buckwalter.

APPLICATIONS OF STATE LEGISLATURES RECEIVED BY THE CONGRESS FOR A CONVENTION PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES JULY 15, 1975—JULY 15, 1985

Year	State	Subject of Constitutional Convention	Congressional Record citation [1]
1975	Louisiana	Budget balancing	Vol. 121, 7/23/75, p. 24412; 7/28/75, p. 25312.
	Kentucky	Compulsory school assignment, prohibition of.	Vol. 121, 9/8/75, p. 27821; 9/21/75, p. 29630.
	Alabama	Budget balancing	Vol. 121, 9/10/75, p. 28347.
1976	Delaware	Budget balancing	Vol. 122, 2/25/76, p. 4329; 3/4/76, p. 5572.
	Georgia	do	Vol. 122, 2/6/76, p. 2740; 2/16/76, p. 3161.
	Massachusetts	Compulsory school assignment, prohibition of.	Vol. 122, 4/7/76, p. 9735.
	Louisiana	Abortions, prohibition of	Vol. 122, 7/22/76, p. 23550.
	Oklahoma	Federal funds, prohibit coercive use by Federal government.	Vol. 122, 7/7/76, p. 16814.
	South Carolina	Budget balancing	Vol. 122, 2/23/76, p. 4090; 2/25/76, p. 4329.
	Tennessee	Federal funds, prohibit coercive use by Federal government.	Vol. 122, 2/17/76, p. 3307.
	Virginia	Budget balancing	Vol. 122, 3/25/76, p. 8019, 3/29/76, p. 8335.
1977	Arkansas	Abortions, prohibition of	Vol. 123, 5/16/77, p. H4499; 5/20/77, p. S8200.
	Indiana	do	Vol. 123, 2/21/77, p. H1240; 2/24/77, p. S2945.
	Maryland	Budget balancing	Vol. 123, 1/28/77, p. S1571.
	Massachusetts	Abortions, prohibition of	Vol. 123, 5/23/77, p. 20659; 7/1/77, p. 22002.
	New Jersey	do	Vol. 123, 3/30/77, p. H2779; 4/5/77, p. 5544.
	Rhode Island	do	Vol. 123, 5/13/77, p. H4149; 5/19/77, p. H4745.
	South Dakota	do	Vol. 123, 5/18/77, p. 11041; 5/22/77, p. 11888.
	Tennessee	Vetoes, grant President item veto power	Vol. 123, 7/1/77, p. S11422.
	Tennessee	Judges, terms of office of Federal	Vol. 123, 6/10/77, p. H5743.
	do	Budget balancing	Vol. 123, 6/10/77, p. H5743.
	Utah	Abortions, prohibition of	Vol. 123, 5/2/77, p. 13057; 5/3/77, p. 13301.
	Virginia	Vetoes, grant President item veto power	Vol. 123, 3/23/77, p. S4675; 3/28/77, p. H2644.
1978	Colorado	Budget balancing	Vol. 124, 4/5/78, p. S4830; 4/5/78, p. H2522.
	Delaware	Judicial appointments	Vol. 124, 1/30/78, p. H372; 2/6/78, p. S1189.
	do	Abortions, prohibition of	Vol. 124, 6/9/78, p. S8932.
	Kansas	Budget balancing	Vol. 124, 5/17/78, p. H4133; 5/19/78, p. S7849.
	Kentucky	Abortions, prohibition of	Vol. 124, 4/23/78, p. S4498; 5/11/78, p. H2781.
	Louisiana	Budget balancing	Vol. 124, 7/14/78, p. S10815.
	Massachusetts	Compulsory school assignment, prohibition of.	Vol. 124, 4/5/78, p. S4830.
	Nebraska	Abortions, prohibition of	Vol. 124, 5/1/78, p. H3393; 5/4/78, p. 56964.
	Oklahoma	Budget balancing	Vol. 124, 5/3/78, p. S6867; 5/1/78, p. H3393.
	Pennsylvania	Abortions, prohibition of	Vol. 124, 5/25/78, p. S6305; 5/24/78, p. H3160.
	South Carolina	Budget balancing	Vol. 124, 5/22/78, p. H4412; 5/23/78, p. S8324.
	Tennessee	do	Vol. 124, 4/25/78, p. S6304.
	do	Control of Judiciary	Vol. 124, 4/25/78, p. S6303.
	Wyoming	Budget balancing	Vol. 124, 5/17/78, p. S7638.
1979	Alabama	Budget balancing	Vol. 125, 3/13/79, p. S2610; 3/15/79, p. H1424.
	Arizona	do	Vol. 125, 4/10/79, p. S4298; 4/10/79, p. H2245.
	do	Business activities, prohibition of Federal government involvement.	Vol. 125, 5/22/79, p. S6469; 5/21/79, p. H3547.
	Arkansas	Budget balancing	Vol. 125, 3/5/79, p. H1068; 3/8/79, p. S2363.
	Florida	do	Vol. 125, 2/22/79, p. H830; 3/1/79, p. S1930.
	Georgia	Abortions, prohibition of	Vol. 125, 3/8/79, p. S2363; 3/12/79, p. H1229.
	Idaho	Budget balancing	Vol. 125, 2/28/79, p. H1004; 3/1/79, p. S1932.
	Indiana	do	Vol. 125, 5/1/79, p. H2534; 5/1/79, p. S5017.
	Iowa	do	Vol. 125, 6/18/79, p. S7879; 6/20/79, p. H4868.
	Louisiana	do	Vol. 125, 7/18/79, p. H6197; 7/19/79, p. S9860.
	do	Regulations and rules, Federal	Vol. 125, 7/17/79, p. H6112; 7/17/79, p. S9647.
	Maryland	Budget balancing	Vol. 125, 6/5/79, p. H4094.
	Mississippi	Abortions, prohibition of	Vol. 125, 2/21/79, p. H816; 2/26/79, p. S1788.
	Nebraska	Budget balancing	Vol. 125, 3/7/79, p. S2185; 3/12/79, p. H1229.
	Nevada	Abortions, prohibition of	Vol. 125, 6/25/79, p. S8409.
	New Hampshire	do	Vol. 125, 5/15/79, p. H3284; 5/16/79, p. S6085.
	New Mexico	Budget balancing	Vol. 125, 2/26/79, p. H898; 5/1/79, p. S1931.

APPLICATIONS OF STATE LEGISLATURES RECEIVED BY THE CONGRESS FOR A CONVENTION PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES JULY 15, 1975—JULY 15, 1985—Continued

Year	State	Subject of Constitutional Convention	Congressional Record citation [1]
	North Carolina	do	Vol. 125, 2/6/79, p. S1123; 2/22/79, p. H830.
	North Dakota	do	Vol. 125, 5/3/79, p. S5290.
	Oregon	do	Vol. 125, 3/15/79, p. H1424; 3/22/79, p. S3165.
	Pennsylvania	do	Vol. 125, 3/12/79, p. S2500.
	South Dakota	do	Vol. 125, 2/27/79, p. H946; 3/1/79, p. S1931.
	Texas	do	Vol. 125, 1/15/79, H130; 3/15/79, p. S2869.
	Utah	do	Vol. 125, 3/7/79, p. H1145; 3/8/79, p. S2363.
1980	Alabama	Abortions, prohibition of	Vol. 126, 5/9/80, p. S5095.
	Arizona	Federal funds, prohibit coercive use of	Vol. 126, 5/15/80, p. S5467.
	Idaho	Abortions, prohibition of	Vol. 126, 3/18/80, p. H1967; 3/21/80, p. S2804.
	Nevada	Budget balancing	Vol. 126, 2/28/80, p. H295; 2/29/80, p. S484.
	Oklahoma	Abortions, prohibition of	Vol. 126, 4/24/80, p. S4202.
	Tennessee	do	Vol. 126, 4/29/80, p. H3074; 5/2/80, p. S4499.
1981	Alabama	Federal Judges, election of	Vol. 127, 9/9/81, p. H6072.
1982	Alaska	Budget balancing	Vol. 128, 2/3/82, p. H200; 3/29/82, p. S2917.
1983	Missouri	do	Vol. 129, 7/11/83, p. H4942; 7/21/83, p. S10594.
1984	Arizona	Vetoes, grant President item veto power	Vol. 130, 5/24/84, p. H4884; 6/11/84, p. S6892.

[1] Page citations preceded by a S or H are to the daily edition of the Congressional Record. Citations without prefixes are to the permanent editions of the Record.

APPENDIX B

LIMITATION OF SUBJECT MATTER TO BE CONSIDERED BY CONVENTION

(Selected Authorities)

"The usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the States will be defeated if the States are told that it can be invoked only at the price of subjecting the Nation to all the problems, expense, and risks involved in having a wide-open constitutional convention."—*Professor Paul Kauper, University of Michigan Law School, "The Alternative Amendment Process: Some Reflections", 66 Michigan Law Review 903, 912 (1968).*

"This construction [that a convention cannot be limited] would effectively destroy the power of the States to originate the amendment of errors pointed out by experience, as Madison expected them to do. Alternatively, under that construction, applications for a limited convention deriving in some States with a dissatisfaction with the school desegregation cases, in others because of the school prayer cases, and in still others by reason of objection to the *Miranda* rule, could all be combined to make up the requisite two-thirds of the States needed to meet the requirements of Article V."—*U.S. Senator Sam Ervin, Chairman, Subcommittee on the Constitution, "The Convention Method of Amending the Constitution", 66 Michigan Law Review 875, 883 (1968).*

"It is our conclusion that Congress has the power to establish procedures governing the calling of a national constitutional convention limited to the subject-matter on which the legislatures of two-thirds of the States request a convention . . . there is no justification for the view that Article V sanctions only a general conventions. Such an interpretation would relegate the alternative method to an 'unequal' method of initiating amendments."—*American Bar Association, "Amendment of the Constitution by the Convention Method Under Article V", pgs. 9, 16 (1973).*

"The reason for including the convention system in Article V seems to have been perfectly clear to provide a means for correcting errors: that is, specific concrete errors or abuses by the National government. Moreover, the language of Article V speaks specifically of 'amendments' . . . Surely it was not thought that by petitioning for an innocuous amendment, for example, on daylight savings time, the States would open up the way for a constitutional convention that would be free to revise the entire taxing authority of the United States or to abolish the House of Representatives."—*Professor Wallace Mendelson, University of Texas, Testimony Before United States Senate Judiciary Committee, October 31, 1967.*

"If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the States to call for a

convention in the absence of a general discontent with the existing construction of the Constitution . . . The intention of Article V was clearly to place the power of initiation of amendments in the State legislatures. The function of the convention was to provide a mechanism for effectuating this initiative."—*Professor Phillip Kurland, University of Chicago Law School, Memorandum to U.S. Senate Judiciary Committee (1967), 1979 Hearings, p. 1222.*

"It is perfectly remarkable that some have argued for a construction [of Article V] not merely limiting the power of State legislatures to have a convention, but limiting that power to its least expected, least appropriate, most difficult (and yet most dangerous) use."—*Professor William Van Alstyne, Duke University Law School, "The Limited Constitutional Convention", 1979 Duke Law Journal 985–98.*

"If the States apply for a Convention on a balanced budget, Congress must call a convention on a balanced budget. It cannot at its pleasure enlarge the topics. Nor can the Convention go beyond what Congress has specified in the call. The Convention's powers are derived from Article V and they cannot exceed what Article V specifies. The Convention meets at the call of Congress on the subject which the States have set out and Congress has called the Convention for."—*Professor John Noonan, University of California School of Law, Testimony Before California State Assembly, February 15, 1979.*

"The constitutional convention is the representative of sovereignty only in a very qualified sense and for the specific purpose and with the restricted authority to put in proper form the question of amendment upon which the people are to pass."—*Professor Thomas Cooley, A Treatise on Constitutional Limitations (Little, Brown & Co. 1927), pg. 88.*

"A constitutional convention has no authority to enact legislation of a general sort, and if the convention is called for the purpose of amending the Constitution in a specific part, the delegates have no power to act upon and propose amendments in other parts of the Constitution."—*Professor Henry Campbell Black, "Handbook of American Constitutional Law" (West Publishing 1927), pg. 45.*

"The Constitutional Convention is . . . as its name implies, constitutional not simply as having for its object the framing of constitutions, but as being within, rather than without, the pale of fundamental law: as ancillary and subservient and not hostile and paramount to it . . . it always acts under a commission, for a purpose ascertained and limited by law or by custom. Its principal feature is that, at every step and moment of its existence, it is subaltern—and it is evoked by the side and at the call of a government preexisting and intended to survive it, for the purpose of administering to its especial needs."—*Professor John Alexander Jameson, A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding (Callaghen & Co., 1887), pg. 10.*

"On the strict legal question, the better view is that there is nothing in Article V to prevent the Congress from limiting the constitutional convention to the subject that made the States call for it."—*Professor Paul Bator, Harvard Law School, "A Constitutional Convention: How Well Would it Work" (American Enterprise Institute Forum, 1979), pgs. 7–8.*

"The power of amendment in Article V is itself constitutionally limited . . . Thus Congress should have the power to restrict the convention to those amendments that deal with the general issue or problem that had inspired two-thirds of the States to call for a convention."—*Amendment by Convention: Our Next Constitutional Crisis?, 1975 University of North Carolina Law Review 491, 508.*

"The two amendment processes, therefore, must be viewed as equal alternatives. The reports of the Convention do not rebut this conclusion and provide no indication that the Framers intended for State legislatures to concern themselves only with total constitutional revision, while Congress alone would initiate specific amendments."—*Robert M. Rhodes, A Limited Constitutional Convention, 26 U. Fla. Law Review (1973) 1, 9.*

"I think the convention can be limited . . . the fact is that the majority of the scholars in America share my view."—*Hon. Griffin Bell, Attorney General of the United States, Issues and Answers, February 11, 1979.*

"While this question then has never been directly decided by the Congress or by the courts, it seems that the whole scheme, history and development of our government, its laws and institutions, require the control of any convention and the most logical place for exercising that control would be in the enabling act convening it, or in some other federal statutory law. Under Article V, Congress calls the convention after the required number of states have submitted petitions. It has the duty to announce the will of the state legislatures in relation to the scope of the convention's business and, under the necessary and proper clause, it may set the procedures and conditions so that the convention may not only function, but that it may control the convention's actions to make certain that it conforms to the mandates and directives of the Congress, the state legislatures, and ultimately the people. This does not mean that the convention may not exercise its free will on the substantive matters before it; it means simply that its will shall be exercised within the framework set by the Congressional act calling it into being."—*Cyril Brickfield, Problems Relating to a Federal Constitutional Convention, reprinted by House Judiciary Committee, 85th Congress, 1st Session (1957), p. 18.*

"The argument that an Article V convention is sovereign and therefore beyond control is specious. The convention is but a constitutional instrumentality of the people, deriving all its powers from Article V . . . an agreement that a convention ought to be held is required among two-thirds of the state legislatures before Congress is empowered to convene such a body. If the agreement contemplates a convention dealing only with a certain subject matter, as opposed to constitutional revision generally, then the convention must be logically limited to that subject matter. To permit such a body to propose amendments on any other subject would be to recognize the convention's right to go beyond that specific consensus which is absolute prerequisite for its creation and legitimate action."—*Professor Arthur Earl Bonfield, The Dirksen Amendment and the Article V Convention Process, 66 Michigan Law Review 949, 994 (1968).*

"It would seem to be consistent with, if not compelled by, the article for Congress to limit the convention in accordance with the

express desires of the applicant states. If Article V requires that a convention be called by Congress only when a consensus exists among two-thirds of the states with regard to the extent and subject matter of desired constitutional change, then the convention should not be free to go beyond this consensus and address problems which did not prompt the state applications."—*Note, The Proposed Legislation on the Convention Method of Amending the United States Constitution, 85 Harvard Law Review 1612, 1628 (1972).*

"The most natural reading of the history behind Article V supports the view that the framers wished to assure the people that even if the central government were unresponsive to defects in the Constitution, the people have another option . . . This [constitutional convention] check on the central government . . . is not effective if people have only the option of an all or nothing approach. The convention method was supposed to be an equal means of amending the Constitution."—*Professor Richard Rotunda, University of Illinois Law School, Letter to Subcommittee on Constitution, Sept. 27, 1979, Hearing Record, p. 507.*

SUPPLEMENTAL VIEWS OF MR. MATHIAS

Our Nation may be about to embark upon an experiment freighted with significance and fraught with risk: the convening of a national convention to propose amendments to our Constitution. The perceived imminence of that event has provided the impetus for the Judiciary Committee's approval, without dissent, of S. 40, the Constitutional Convention Implementation Act of 1985.

This legislation is a proper response to the prospect of a new constitutional convention. It is prudent to erect some signposts along the uncharted road that may soon lie before us. But if we believe that the approval of this bill will do much to make that road smoother or safer, or to illuminate the destination to which it may lead us, then we are deceiving ourselves, and misleading the American people.

Although I voted to report this measure to the full Senate, and although I support the basic contours of the legislation, I am compelled to add my separate views to this report. My purpose is to make clear my reasons, which are quite limited, for supporting constitutional convention implementation legislation, and to point out some respects in which this bill falls short as a response to the prospect of a new constitutional convention.

I.

The progress of this bill through the legislative process may send mixed messages to the American people. I believe it is useful to emphasize some of the messages our actions are *not* intended to send.

First, we do not intend to send the message that a new constitutional convention is either necessary or desirable. The Committee's report quite properly points out that our intentions are neutral. Article V of the Constitution commands the Congress to call a convention whenever two-thirds of the States have petitioned for one. The purpose of S. 40 is to provide procedures for determining when we have reached that point, and for taking action in response to article V's command.

Prudence, not enthusiasm, dictates this course. It has been suggested that the State legislatures that have called for a constitutional convention are playing with fire. If so, it is not surprising that some members of this Committee approach this issue with the attitude of a fire marshal contemplating the chances of a conflagration. If we plan now what to do if and when the alarm bell rings, no one can justly accuse us of pyromania.

Second, the fact that we report this legislation now does not justify the inference that we believe we will need to use it in the near future. Thousands of petitions and memorials have been laid before the Congress in recent years. A few dozen of these, perhaps, relate

in some way to article V or a constitutional convention, or refer to one or another proposal for constitutional change. Which of these petitions are properly considered as applications under article V for a convention, and which of them may be aggregated with any others, are issues that are not now before this Committee. This bill simply supplies the criteria by which a future Congress may judge the petitions that are before it, and may thereby determine whether its duty under article V to call a convention comes into play. This bill does not reflect any consensus about how close we now are to that point, and any implication to the contrary misreads our intentions.

Third, no one should make the mistake of assuming that enactment of this legislation would guarantee that a constitutional convention may be limited to the subject matter of the applications from the State legislatures that give rise to it. Few subjects have been debated with more fervor by constitutional scholars in recent years. The results of that debate can only be characterized as inconclusive.

The Committee's report thoroughly canvasses the arguments in favor of congressional power to limit a convention to a designated subject matter. It does not adequately stress that many of those who have thought most deeply about this subject have reached a contrary conclusion. Some of the arguments against the proposition are outlined in Senator Leahy's additional views. But the controversy over this issue pervades the records of the numerous hearings that have been held on constitutional convention implementation legislation over the past two decades. From the perplexity expressed by the late Professor Alexander Bickel in testimony before the Subcommittee on Separation of Powers in 1967, to the forthright argument made by Professor Neil Cogan in 1984 that the attempt to limit the convention's jurisdiction would render the entire bill unconstitutional, nothing is clearer from the record than this: *Congress may not have the power to restrict the convention to a stated subject matter.* The fear of a "runaway convention"—an assemblage convened to address the issue of a balanced budget amendment, but which proceeds to propose amendments to the Bill of Rights, or to rewrite the entire Constitution—cannot be entirely dispelled.

S. 40 purports to prevent a runaway convention, by giving Congress the power to refuse to send to the States for ratification any amendment proposed by the convention that falls outside the subject matter for which the assemblage was called. We cannot really be sure that this stratagem will achieve its goal. If a convention exceeds the scope of its mandate, we cannot know whether a future Congress will choose to exercise the restraining power that this bill tries to give it. If Congress does refuse to send an amendment out for ratification, and this action is challenged in court, we cannot know whether a court would find the controversy to be justiciable, and, if so, how it would resolve it. Our declaration that Congress has the power to frustrate a runaway convention may serve a useful purpose—to express our view that a convention *ought* to observe the limits defined for it in Congress' call—but we should recognize that it may not be possible to take it literally.

In the final analysis, the scope of the powers of a constitutional convention will not be determined by legal scholars, nor by Senators, but by the actions and attitudes of the delegates themselves. In this regard, the historical record is not comforting. The only constitutional convention we have ever had was a runaway convention. In fact, it did not start off to be a constitutional convention at all, but was the outgrowth of several earlier gatherings of much more modest aspirations.

In 1784, a dispute broke out between the watermen of Maryland and those of Virginia over the control of fishing in the Potomac River which is totally within Maryland although its southern shore is the common boundary. The Virginians reacted to the curtailment of their freedom to fish in the Potomac by restricting the passage of Maryland ships through Cape Charles and Cape Henry, the passage between the Atlantic Ocean and Chesapeake Bay. Thus Maryland commerce was blockaded and Virginia fishing suspended except on the onerous conditions each side laid down. The Articles of Confederation provided no method for resolving such disputes and only George Washington's personal invitation to meet at Mount Vernon produced a solution, the Compact of 1785.

But the dispute had revealed a major flaw in the organic law that needed to be addressed, and so it was resolved to ask a more representative group to meet in Annapolis to consider some refinement of the Articles in the limited area of removing interference with interstate commerce.

The meeting in Annapolis was unsuccessful and adjourned without agreeing on the way to carry out this specific mandate. It therefore proposed to call a second session to meet in Philadelphia to complete the job. The delegates who assembled in Philadelphia during the summer of 1789 were empowered only to propose refinements in the Articles of Confederation. But when the convention gathered, it conceived that it had supreme power to act in the name of the people, to define its own mandate, and, ultimately, to replace the organic law of the Nation with another. If the remarkable men who drafted our Constitution felt free to go beyond their appointed bounds, we cannot be sure that any other group of men and women, when they meet in the heady atmosphere of the first constitutional convention in two centuries, will respect the limits assigned them by Congress. That uncertainty will remain, even if S. 40 is enacted into law.

II.

S. 40 represents a sincere and thoughtful effort to establish sensible guidelines for the discharge of Congress' obligations under article V of the Constitution. As reported by the Judiciary Committee, the bill incorporates several important improvements in the procedures suggested by previous constitutional convention implementation bills. I am particularly pleased that the Committee has included a provision in this bill to provide for representation of the people of the District of Columbia at any convention. This provision recognizes that these citizens of the United States should be included in any convention proposing amendments to our fundamental charter under which they, like all other American citizens,

must live. There are, however, further improvements that could be made, and that I hope will be adopted when this bill is considered by the full Senate. I will mention three of them here.

First, section 5 of S. 40 would require Congress to consider as valid and timely applications that may have been submitted by a State legislature as many as *14 years* prior to the time they are considered by Congress. In a society in which rapid change is one of the only constants, this period is far too long. Applications ought not to be aggregated unless they are reasonably contemporaneous; and I cannot accept that a resolution passed by a State legislature in 1973 can conclusively be presumed to represent the views of that legislature in 1987. (It is worth noting that fewer than one-fourth of the Members of today's Senate held their seats 14 years ago.) In addition, the constitutional convention bill that was reported by this Committee last year "grandfathered in" only those applications 10 years old or younger. By contrast, S. 40 has extended that period to include applications up to 12 years old. Fairness to the States does not require that any applications for a constitutional convention receive the benefit of a "grandfather clause"; indeed, fairness to the current members of State legislatures would suggest that expressions of sentiment more than a decade old ought to be ignored. If the subject matter is still important enough to the State legislature to motivate a convention application, it will not be difficult for the sitting legislature to renew its call. In my view, no application more than 7 years old ought to be aggregated with any other toward the two-thirds required by article V.

The remaining problems that I will note at this time concern the composition of the constitutional convention itself. This is an area in which article V seems to give Congress relatively wide latitude. Nothing in the Constitution dictates how States ought to be represented, nor even whether representation by States is required. The Committee's adoption of an amendment providing representation for residents of the District of Columbia acknowledges this fact. Article V is also silent as to the qualifications of the delegates. The guiding principle for action in this field should be to make the convention as broadly representative as possible of the American electorate. In two important respects, the bill as reported by the committee falls far short of this goal.

First, the representation accorded to the States under S. 40 violates the constitutional principle of one-person-one-vote. Under section 7(a) of the bill, each State would be entitled to send as many delegates as it has representatives in both Houses of Congress. This apportionment formula greatly exaggerates the power of small States by incorporating the numerically equal representation that each State enjoys in the Senate. Since under article V each state already has an equal voice in ratification of amendments proposed by the convention, this formula for representation at the convention assures, in the words of one respected commentator, "not a balance but a systematic and pervading over-weighting of the influence of the less populous states." Black, *Amending the Constitution: A Letter to a Congressman,* 82 Yale L. J. 189, 205 (1972). More than 20 years ago, the Supreme Court ruled that the precedent of equal representation in the Senate, which arose from "unique historical circumstances," was "inapposite and irrelevant" to ques-

tions of apportionment of State legislatures. *Reynolds* v. *Sims,* 377 U.S. 533, 573–74 (1964). The same principle applies here. Abandonment of the one-person-one-vote principle will create a significant constitutional issue even before the convention is called to order. We should replace the formula contained in this bill with a fairer method of apportionment.

Second, section 7(a) of the bill sets up the only qualification for delegates to the constitutional convention. Delegates, it appears, may be of any age; they need not have any particular background; it is not even clear that they need to be citizens of the United States. But they must not be Members of Congress, or officers or employees of the U.S. Government. There may be some arguments for the former exclusion, but the latter seems to be completely unjustified. It is not acceptable to me to deny a postal worker, a civil servant, or another government employee the right to serve as a delegate to a constitutional convention. That is no way to reward those who have chosen public service as a career. This is another unjust provision of the bill that we should rectify on the Senate floor.

III.

The words of article V are terse: "The Congress . . . on the Application of the Legislatures of two thirds of the several states, shall call a Convention for proposing Amendments. . . ." As Alexander Hamilton wrote in *Federalist No. 85,* "The words of this article are peremptory. The Congress '*shall* call a convention.' Nothing in this particular is left to the discretion of that body." But as we know from nearly 20 years of study of this subject, that is not where the questions end, but where they begin. The bill we report today tries to answer some of those questions. But from the nature of the problem, we may be sure that no bill can ever answer them all.

Scarcely a year after the first Constitutional Convention concluded its deliberations, one of its most prominent members expressed these forebodings about the prospect of its repetition:

> [An Article V Constitutional Convention] would consequently give greater agitation to the public mind; an election to it would be courted by the most violent partisans on both sides; it would probably consist of the most heterogenous characters; would be the very focus of the flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts, but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I should tremble for the result of a second.

Almost 200 years after James Madison wrote this prophecy, we may have the opportunity to test its accuracy. If the enactment of legislation such as S. 40 does anything to make it less likely that Madison's fears will be realized, then we can be proud of our role in reporting the bill. If, on the other hand, our message is misread, then all of us will suffer the unhappy consequences.

ADDITIONAL VIEWS OF MR. BIDEN

The purpose of this legislation is to minimize the possibility that a constitutional convention called on a particular subject will turn into a convention that puts the entire Constitution at risk. No one can be certain that this legislation, or any legislation, can accomplish that purpose. Indeed, some of this Nation's foremost constitutional scholars have expressed to the Committee their opinion that Congress cannot statutorily limit a convention. I have joined in supporting S. 40 for the simple reason that if a constitutional convention is called on a particular subject, it is important that Congress do its utmost to keep such a convention from turning into an open-ended convention that would threaten the soundness and stability of our Constitution.

The Constitutional Convention Implementation Act of 1985 is not intended to encourage State legislatures to apply for a constitutional convention. Nor should S. 40 be interpreted to express an opinion on the part of the Judiciary Committee that a constitutional convention is desirable. Indeed, I have great reservations about the wisdom of convening a constitutional convention.

ADDITIONAL VIEWS OF MR. LEAHY

The Judiciary Committee has, after long debate, adopted procedures to be applied at a convention called by the States under article V to amend the U.S. Constitution. I supported this legislation for one very cogent reason: The risks of not adopting a bill—the risks of conducting a convention without prior guidance of any kind--were far greater than the risks of acting.

This bill—and a similar one considered in the last Congress--is unlike any that the Committee has acted on within memory because its constitutional basis is unclear and its effect uncertain. Most bills considered by the Congress are either bills whose constitutionality is not at issue, or if it is, the dimensions of the constitutional debate are addressed by reference to Supreme Court precedents or the history of prior legislation. Last year's debate over proposed limits on the exclusionary rule is a good example. Both supporters and critics of the legislation are well versed in the issue following years of intense litigation and commentary by scholars.

There is no such guidance to shore up the debate on the proper scope of constitutional convention procedures legislation. There has been no convention since 1787 and no litigation that is directly applicable to the brace of difficult questions that confronted the Committee when it set out to draft a bill.

Let me begin with the first sentence of the bill, describing how States shall adopt a resolution calling for a convention "for the purpose of proposing one or more specific amendments to the Constitution * * *." By its terms, the bill does not apply to a convention called for the purpose of amending the Constitution generally, and indeed a lot of the bill's provisions would be inapplicable to such a convention.

Yet when I asked a number of constitutional scholars to offer their views about this legislation, some even doubted that the concept of a limited convention was viable. Prof. Gerald Gunther, in a letter dated April 9, 1984, expressed "very serious qualms about the proposal." He said, "I am persuaded by the text, history, and structure of the Constitution that a constitutional convention, once it is convened, is essentially on its own bottom: it was intended to be and should be a separate, essentially autonomous forum of constitutional decisionmaking."

Professor Gunther firmly believes that a convention called on a particular subject matter may set its own agenda once convened and may consider any constitutional issue. That is surely not the only view, but it is a view sufficiently widespread within the academic legal community to give us serious concern.

Testifying before the Committee on April 25, 1984, Prof. Neil Cogan of Southern Methodist University was equally firm on the limits of congressional action. He discussed the history of article V and then stated:

> This history shows at least a century's understanding that the Congressional mode of proposing amendments was intended for specific revisions, and the convention mode for general revisions . . . It is inconsistent with these historic understandings for the people to meet in convention only for the purpose of ratifying what their legislatures have already proposed.
>
> For these reasons, I believe that Section of (the bill) and the entire bill for that matter, is unconstitutional.

Prof. Walter Dellinger of Duke University replied to my request in a letter dated April 17, 1984. He agrees with Professors Gunther and Cogan that Congress does not have the power to limit a convention to a single proposal but draws on his own alarming conclusion about the consequences of adopting the bill:

> (The bill) is a very dangerous piece of legislation. It contains in section 10 the wrong answer to the critical question raised by the pending petitions for a constitutional convention. If adopted, it would provide an argument that Congress had *already decided* the central issue of the validity of those petitions. Under one reading of section 10, Congress would be obligated to take state legislative applications for an extremely limited Convention, broaden the requested amendment into a "general subject" and then call a Convention of broad powers—when the original state legislative petitions have made it perfectly clear that they *did not want* a Convention of that kind to be called.

I do not believe that the kind of reading that Professor Dellinger suggests is a correct reading of section 10, though I can understand how and why he raises the point. When the entire Constitution is potentially at stake, a reading of a bill that is possible, but implausible, offers far too great a risk. We ought to make certain in the clearest possible terms that Congress does not intend that it is obligated to broaden legislative applications for an extremely limited Convention.

But the main point is more important than any one of the issues raised by the constitutional experts. The main point is that our venture into this legislative thicket, however carefully undertaken, is an exercise in uncertainty. I conclude, after reviewing the testimony on the record in hearings on S. 119 in the 98th Congress, and the voluminous record associated with the hearings on S. 3, S. 520 and S. 1710 in the 96th Congress, that no bill can successfully deal with the core of issues accompanying any call for a constitutional convention without that uncertainty.

This Committee bears a strong responsibility to acknowledge the uncertainty in floor debates, and ultimately to the public. Some will argue in response that the scope of the bill ought to be scaled back to include only those housekeeping provisions that are beyond debate, such as establishing a time and place for convening. But I believe that to the extent major substantive issues are eliminated, we begin to replicate the original problem—the risk of a convention with no guidance whatsoever.

Despite the legal ambiguities, there is no reason for Congress to be completely passive in the face of such a threat. I believe it is more responsible to use our best efforts to craft an effective and constitutional measure, and that is what we have done. Some would draw the necessarily fuzzy line between substance and housekeeping and would declare that it is Congress' duty not to purport to direct the Convention with respect to subject matter that may possibly turn out to be substance.

That is not a fit standard in an area where there is little legislative history, not a single example of use of this method of amendment in nearly 200 years, no directly applicable court precedents, and considerable doubt as to whether the courts would accept jurisdiction of a case that questioned the scope of the convention's authority.

A better standard is for the Congress to draft a bill that will not interfere with the clear prerogatives of a constitutional convention but which speaks in practical and workable terms about subjects that are necessary to clarify and which may arguably fall within the ambit of congressional power.

If the bill is drafted carefully and reflects a determined effort to be fair, there is every reason to believe that a convention will follow the mandate of the bill rather than to test it judicially or risk using the precious time of the convention to fashion a totally different system. The work of Congress can have a strong moral force, and this is one case where that force can, and should be exercised.

With the exception of my separate views on the issue of contemporaneousness, I feel the current compromise is fair and workable.

But at the same time we have a strong obligation to announce our concern about the uncertainty of this bill very clearly. This is one piece of legislation that ought to come with a warning label, and that label should strongly discourage use of the product—in other words, a constitutional convention.

Nothing has convinced me more than the deliberation on this bill that a convention to amend the Constitution is a great risk both to the integrity of the Constitution and to the quality of the process by which conflicts over the meaning of the Constitution are resolved. Professors Gunther, Cogan, and Dellinger might be correct that a convention, once assembled, would be free to consider any proposal it wanted to consider. If this occurs, as Professor Dellinger suggests it might, despite the restrictive language in some State resolutions calling for a convention, there is a serious risk that the expectations of many Americans about the scope of the convention will not have been respected.

The answer to this criticism given by supporters of a constitutional convention is that the States will choose delegates to such a monumental proceeding with great care, and that the convention, no more than the Congress, is likely to dismantle the Constitution.

There is every reason to suppose that the States will choose responsible people to serve as delegates to a convention, but it will be a body without a history and a body with more immediate power than any before it. Despite the fact that its work product would have to be ratified by three-fourths of the States, it is a body that will lay strong claim to ratification, since it will consist of men and

women chosen for the express purpose of amending the Constitution. While it may not be a body any less expert in constitutional law and history than the Congress, it would plausibly be a body with a greater sense of urgency to effect changes in the Constitution, because of its limited life, and a greater sense of mission, because of its very reason for being.

The traditional approach to proposing amendments—approval by two-thirds of each house—is inevitably hobbled by institutional restraints. The committee system is the source of much delay, but much more importantly Senators and Representatives with responsibility for a wide range of issues, constitutional and otherwise, are more likely to weigh a proposal for amending the Constitution more carefully than members of a body that meets once and whose members need not stand for reelection. From a zealot's point of view, restraint based on political reality is reprehensible. But where the Constitution is concerned, there is nothing ignoble about political restraint, and on the other hand it is troubling to know that, whatever the quality of its individual members, a convention specially called to amend the Constitution is certain to exercise little of that restraint.

This Committee, and this Congress if this legislation is adopted, should make as clear as possible to the American people that the adoption of a constitutional convention procedures bill should not signal that a convention is desirable or needed or that the convention process is somehow endorsed by Congress. I hope and expect that all of my colleagues will join in such a statement.

On a personal basis I would go even further and say that the uncertainties surrounding the bill imply a strong recommendation by Congress that the States not call a convention to amend the Constitution, however great the temptation. Deep conflicts over the meaning of article V will result from any convention that strays from the concurrent resolution adopted by the Congress, and there is no certainty that the Supreme Court will agree that it has the jurisdiction to resolve those disputes or that the delegates would ultimately accept judicial resolution, given the broad nature of its power as a body outside of the three established branches of government.

It is difficult to foresee how such a conflict could be resolved in a manner that will be calculated to command wide acceptance by everyone involved. For that reason the best use of this bill once it is passed is to sit unused forever, and I urge our colleagues to make that view as clear as possible to the American people.

To this point I have assumed that the bill is the best proposal that can be achieved, given the severe limitations just discussed. But there is a specific provision of the bill that should be reexamined and amended, and that is section 5 dealing with the effective period of an application.

S. 40 states a basic effective period of 7 years, but if an application has not been before Congress for more than 12 years when the bill becomes law, it has up to 2 more years of life, for a maximum total of 14 years for some applications. I note that this is 2 years longer than the effective period contained in procedures legislation reported by the Committee just last year.

To get a sense of how long 14 years can be, we need only look at our recent past. Fourteen years ago we were at the height of the Vietnam war, Watergate had not happened, and the national debt was $400 billion. Fourteen years before that, Ike was President and Sputnik had just been launched.

During markup of the bill, I proposed that a straight 7-year period replace the formula in section 5 of S. 40. The 7-year period would faithfully execute the constitutional requirement that two-thirds of the States take reasonably contemporaneous actions in calling for a constitutional convention. It is the same period used in the Ervin bill which passed the Senate twice by unanimous votes in 1971 and 1973. And it is the same period used commonly in establishing a period for ratifying amendments to the Constitution.

On a somewhat analogous issue, in 1921 the Supreme Court upheld a 7-year amendment ratification period as "sufficiently contemporaneous * * * to reflect the will of the people in all sections at relatively the same period. * * *"

The supporters of S. 40 as adopted by the Committee argue that its greater leniency is justified by the need to fulfill the reasonable expectations of the States which submitted applications for a convention prior to enactment of procedure's legislation.

But the reasonable expectation theory is misplaced. The requirement of contemporaneousness is inherent in the constitutional mandate that two-thirds of the States, and not fewer, call for a convention. If the applications are not contemporaneous, they cannot be aggregated for purposes of reaching the required two-thirds threshold. While a State could not have been charged with knowledge of this legislation prior to enactment, its people and its legislature are charged with knowledge of the contemporaneousness requirement.

Reliance upon a misunderstanding of the law creates no equities in those who are victims of the misunderstanding. If State legislature calls for a convention in expectation that its application will be valid indefinitely, its expectation is misguided, and the agency that announced the State's error—be it a court or the Congress—is not the cause of the problem.

Nor can the States which have passed applications honestly claim that they had no knowledge that a fixed term for the effective period of their applications of 7 years or less would be imposed. The Senate has twice passed procedures legislation by unanimous votes that contained a 7-year effective period provision.

Furthermore, the most widely circulated treatise concerning the calling of a constitutional convention is the report of the American Bar Association's Special Constitutional Convention Study Committee. This report was published in 1973, 2 years prior to the first petition for a Balanced Budget Constitutional Amendment, and it stated that a 7-year period or shorter effective period was constitutionally required.

The Constitution should never be amended by a body that arises from an alliance between one generation and another. Article V never intended to impose the requirement of action by many States in the same moment. But reasonably contemporaneous expression is a fair standard, and is one that should not be compromised.

When we match a very new application for a convention with a very old one, it is relevant to ask what the people now living in the State with the old application think about the need to call for a convention. What their predecessors wanted might or might not reflect their own views on the day when the application is finally counted for purposes of meeting the two-thirds requirement of article V. This is particularly true in an age when the pervasiveness of the media all but guarantees continual and relatively rapid changes in public opinion.

In this connection, the amendment I proposed in Committee is even more critical than it was last year, when the maximum period under S. 119 was only 12 years. There seems to be no end to the length of time proponents of the 14-year provision are willing to give to the State to accomplish their primary objective of adopting a Balanced Budget Constitutional Amendment.

The 7-year requirement enjoys the support of history and is far beyond the length of time any State actually needs to consider the question of a constitutional convention. It would assure us that when we speak of the "American people" acting together to amend its basic instrument of government, we are describing a living consensus. It would more faithfully reflect the intent of the drafters of the Constitution than does the text adopted by the Committee.

If the full Senate adopts my amendment, as I hope it will, some States may have to reconsider outdated calls for a convention. That may make it a little harder to call a convention, but if one is called, it would lend immeasurable weight to the product of its deliberations.

○